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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-

SHERIDAN ROAD BAPTIST CHURCH, *et al.*,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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QUESTIONS PRESENTED

1.

A Michigan statute forbids the offering of regular instruction in religious schools by any person not state-licensed to teach. May the state, without violation of the Free Exercise and Establishment Clauses, enforce the statute through closure of the non-tax-supported schools of churches which, because of material religious objections, cannot comply with the statute?

2.

May the statute, without violation of the Free Exercise Clause, be enforced where to do so would deprive parents of a school which they had chosen for their children in the exercise of religious conscience?

3.

Would enforcement of the statute deprive the church and its congregation of rights of enterprise and property guaranteed by the Due Process Clause of the Fourteenth Amendment?

4.

Would enforcement of the statute deprive the parents of freedom, protected by the Ninth Amendment, to exercise parental rights in the choice of education for their children?

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiffs (Petitioners here)

Sheridan Road Baptist Church*
First Baptist Church Bridgeport*
Reverend Gerald Somero
Reverend Rene B. Ouellette
William L. Swain
Sharon Swain
Ronald Munson
Janice Munson
Mrs. Susanne Kwaitkowski

Defendants (Respondents here)

State of Michigan, Department of Education
Phillip E. Runkel, Superintendent of Public Instruction

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*In accordance with Rule 28.1, Sheridan Road Baptist Church and First Baptist Church Bridgeport state that each is a corporation which has no parent companies or subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. The Case Presents An Important Free Exercise Issue Not Yet Considered By This Court	9
II. There Exists A Conflict In State Court Decisions With Respect To State Licensing Of Religious School Teachers	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	Page
Board of Education v. Allen, 392 U.S. 236 (1968).	10
Goldman v. Weinberger, 475 U.S. ___, 106 S.Ct. 1325 (1986)	8
Hunt v. McNair, 413 U.S. 734 (1973)	9
Johnson v. Charles City Community School Board of Education, 368 N.W.2d 74 (Iowa 1935), *cert. denied sub nom. Pruessner v. Benton*, ___ U.S. ___, 106 S.Ct. 594 (1985)	12
Lemon v. Kurtzman, 403 U.S. 602 (1971)	9,10
Meek v. Pittenger, 421 U.S. 349 (1975)	9
Meyer v. Nebraska, 262 U.S. 390 (1923)	10
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)	9
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	9,10
Rudasill v. Kentucky State Board of Education, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980)	12
Sherbert v. Verner, 374 U.S. 398 (1963).	8
State v. Rivinius, 382 N.W.2d 270 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983).	12
State of Nebraska ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed*, 454 U.S. 803 (1981)	12
State of Ohio v. Whisner, 47 Ohio St.2d 224, 351 N.E.2d 750 (1976)	12
State of Vermont v. LaBarge, 134 Vt. 226, 357 A.2d 121 (1976)	11
Wisconsin v. Yoder, 406 U.S. 205 (1972).	8

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Wolman v. Walter, 433 U.S. 229 (1977)..... 10

Constitutions:

United States Constitution:

Amendment I ..... *passim*

Amendment IX i,2,5

Amendment XIV i,2,5,10

Statutes and Regulations:

28 U.S.C. §1257(3) 2

1921 P.A. 302, §1, *et seq.*; M.C.L. §388.551, *et seq.*; M.S.A. §15.1921, *et seq.* 2

1921 P.A. 302, §2; M.C.L. §388.552; M.S.A. §15.1922 3

1921 P.A. 302, §3; M.C.L. §388.553; M.S.A. §15.1923 3,7

1921 P.A. 302, §4; M.C.L. §388.554; M.S.A. §15.1924 4

1921 P.A. 302, §5; M.C.L. §388.555; M.S.A. §15.1925 4,6

1976 P.A. 451; M.C.L. §380.1561; M.S.A. §15.41561 2

1979 Mich. Adm. Code, R 390.1101, *et seq.* 2,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 86-

SHERIDAN ROAD BAPTIST CHURCH, *et al.*,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The petitioners, Sheridan Road Baptist Church, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Michigan, rendered by an equally divided vote, which was entered in the above entitled proceeding on November 24, 1986, a motion by petitioners for rehearing having been denied by that court on December 30, 1986.

OPINIONS BELOW

The opinions of the Supreme Court of Michigan are reprinted in the Appendix hereto at A-1[1], A-23 and A-53 and are reported at 426 Mich. 462, 396 N.W.2d 373 (1986). The opinion of the Court of Appeals of Michigan is reprinted in the Appendix hereto at A-118, and is reported at 132 Mich. App. 1, 348 N.W.2d 263 (Mich. App. 1984). The opinion and order of the Circuit Court for the County of Ingham is reprinted in the Appendix hereto at A-142, and is not reported.

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1. The signal "A" refers to the appendices hereto.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of Michigan on November 24, 1986. A motion for rehearing was denied December 30, 1986. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

U.S. Constitution, Amendment IX:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;. . ."

1921 P.A. 302, § 1, *et seq.*; M.C.L. § 388.551, *et seq.*; M.S.A. § 15.1921, *et seq.*, reprinted in the Appendix at A-158.

1976 P.A. 451; M.C.L. § 380.1561; M.S.A. § 15.41561 reprinted in the Appendix at A-163.

Michigan Teacher Certification Code (1979 Mich. Adm. Code, R 390.1101, *et seq.*), reprinted in the Appendix at A-165.

STATEMENT OF THE CASE

The two schools involved in this case were founded by the congregations of independent Baptist churches in

the late 1970s (J.A. 60a)[2] for the sole purpose of affording a specific and pervasively religious education to children. (J.A. 60a). The schools were placed under the governance of the churches, with the aim of "offering parents an alternative in education for their children whereby methods of instruction, curricula and teaching materials may be different from those found in the public schools, while yet producing students who achieve literacy, proficiency in basic learning and training in civic virtue." (J.A. 16a-17a). The schools have been built, maintained and staffed solely out of the free-will support of their religious patrons and sponsors and have refused all forms of local, state or federal tax support. (J.A. 15a, 72a). The schools' teachers are selected by the churches, first on the basis of spiritual qualification and then on the basis of ability to communicate general learning. (J.A. 64a-65a). They are paid out of church funds. (J.A. 60a).

Section 3 of the 1921 Michigan statute pertaining to "private, denominational and parochial schools" (hereinafter, the "Act")[3] provides in part:

> "No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state. . . ."

M.C.L. § 388.553; M.S.A. § 15.1923.

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2. "J.A." denotes the Joint Appendix filed in the Supreme Court of Michigan.

3. A "private, denominational and parochial school" is defined in Section 2 of the Act as "any school other than a public school giving instruction to children below the age of 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state." M.C.L. § 388.552; M.S.A. § 15.1922.

Section 4 of the Act provides that if the state Superintendent of Public Instruction "shall find that the violation complained of has been established", he shall order that compliance with the Act take place within 60 days. If the order is not obeyed within that time, the Superintendent "may close said school and prohibit the said person . . . operating . . . such private, denominational or parochial school from maintaining said school or from exercising any of the functions hereunder. . . ." Further, "[t]he children attending a private, denominational or parochial school refusing to comply with the requirements hereof after proceedings herein set forth shall be compelled to attend the public schools or approved private, denominational or parochial school under the provisions of the compulsory education act. . . ." M.C.L. § 388.554; M.S.A. § 15.1924.

Section 5 of the Act requires each private, denominational or parochial school to submit for examination "the qualifications of its teachers" and any refusal to do so "shall be considered sufficient cause to suspend the operation of [the] school. . . ." M.C.L. § 388.555; M.S.A. § 15.1925.

On December 10, 1979, the State Department of Education, citing the aforementioned statute, sent letters to the two schools (Sheridan Road Baptist School, Saginaw, Michigan, and Bridgeport Baptist Academy, Bridgeport, Michigan) threatening legal action unless the schools would furnish information contained in a "Teacher Information Sheet". (J.A. 600a, 605a). That form, reciting the Section 3 prohibition barring teaching, in religious schools, by non-state-certified teachers, required the schools to identify each of their teachers as being state-certified or not state-certified. (J.A. 591a). The two schools refused to fill out and return the form, stating as their ground that they could not, as a matter of doctrinal principle, recognize the validity of a law which requires a religious school to utilize as teachers, solely persons

licensed by the State. (J.A. 50a-53a, 67a, 95a-96a).[4] On July 1, 1980, the Attorney General of Michigan, on behalf of the State Department of Education, instituted administrative proceedings against the schools to suspend the schools' operation in accordance with the Act. (J.A. 27a).

On December 8, 1980, the petitioners Sheridan Road Baptist Church, the First Baptist Church, Bridgeport, the pastors of those churches, parents of children attending the two schools, and a teacher at Bridgeport Baptist Academy brought this action in the Circuit Court for the County of Ingham (Michigan) for a declaratory judgment that the application of the Act to the church-schools in question would be violative of, *inter alia*, the Free Exercise and Establishment Clauses of the First Amendment, and, as to the parent plaintiffs, their liberty, under the Ninth Amendment, to exercise conscientious choice of a religious education for their children. A declaration was also sought that application of the Act herein would deprive the religious parties of "rights of property and enterprise" contrary to the requirements of the Due Process Clause of the Fourteenth Amendment. These plaintiffs (the petitioners here) also sought an injunction restraining the State from taking action to impose the requirements of the Act on the schools.[5]

Insofar as the Act's certification requirements were concerned, petitioners' basis for objection was twofold.

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4. Testimony at trial established that not all of the teachers at the schools were certified or certifiable. (J.A. 21a, 168a).

5. The complaint also presented constitutional challenges to certain provisions of the Act pertaining to state licensing of religious schools, to State prescription of curriculum, and to reporting requirements. Before the Michigan Supreme Court, the State and petitioners both urged a limiting construction of the Act's licensing and curriculum requirements which would satisfy the State's interest and remove petitioners' constitutional objections. The Michigan Supreme Court hence dealt with the case as one concerning solely the teacher certification requirement.

First, they rejected, on religious grounds, the Act's requirements that no one might carry out a teaching ministry in the Churches' schools without a governmental license to do so (J.A. 23a, 67a, 68a) and that their teachers must be subject to ongoing state evaluation and surveillance. (J.A. 24a; M.C.L. § 388.555; M.S.A. § 15.1925). Second, the Teacher Certification Code, 1979 Mich. Adm. Code, R 390.1101, *et seq.*, contained provisions which imposed substantial limitations upon the freedom of the Churches' teaching ministry (J.A. 67a-71a), while lacking any utility to the schools (J.A. 71a-72a) whose pupils[6] were already achieving well in nationally standardized tests. (J.A. 119a-122a, 399a-455a).

The State filed an answer and counterclaim, Paragraph 30 of the answer admitting that the Department's complaints "seek a determination that the operations of said schools be suspended." (J.A. 39a). The counterclaim sought an injunction which (so far as relevant here) would require the two churches and their schools to submit records to the State respecting the qualifications of their teachers. The counterclaim also asked for a declaration that the Act is constitutional as applied to the "churches and the schools they operate."

A six-day trial ensued in April, 1982, in Ingham County Circuit Court during which petitioners called upon parents (J.A. 130a-145a), children enrolled in the schools (J.A. 145a), teachers (J.A. 168a) and nine state officials for testimony. (J.A. 100a-118a, 238a-276a, 286a-311a). Educational experts, including Dr. Donald A. Erickson of the Graduate School of Education of UCLA, also called by petitioners, testified to a "distinct lack of consensus" as to how teachers should be trained (J.A. 283a), concluding that state certification of nonpublic

6. Both Sheridan Road Baptist School and Bridgeport Baptist Academy have substantial numbers of black and other minority students. Their students are mainly drawn from lower middle income families.

school teachers did not represent a compelling societal interest. (J.A. 285a, 216a-217a). The State's expert witness, Dr. Judith Lanier, Dean of the College of Education, Michigan State University, testified that she knew of no educational research findings which demonstrated that the State certification of school teachers had resulted in better teaching. (J.A. 110a-111a).

The Circuit Court entered a memorandum decision December 29, 1982, making a finding that teacher certification does not ensure teacher competency. (A-142, A-148). The court held that the certification requirement of Section 3 of the Act interferes with the petitioners' free exercise rights and that it "causes excessive governmental entanglement with religion." (A-148).

The State appealed to the Michigan Court of Appeals which, on February 7, 1984, reversed, holding Section 3 constitutional as applied to petitioners. Petitioners appealed to the Supreme Court of Michigan. That court, on November 24, 1986, affirmed by an equally divided vote of three to three. Voting for affirmance, Chief Justice Williams[7] contended that any violation of the petitioners' religious beliefs was minimal (A-18), that a compelling state interest in furthering education dictated imposition of the teacher certification statute on petitioners' schools (A-17 - A-18), that no less restrictive means to achieve that interest was available (A-20), and that no impermissibly entangling relationships resulted from requiring all the teachers at the church-schools to be state-certified (A-22).

An opinion concurring with Chief Justice Williams, signed by Justices Boyle and Brickley, while agreeing with the result reached in the foregoing opinion, argued that a different standard of review should be applied:

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7. Chief Justice Williams is no longer a member of the Supreme Court of Michigan, having resigned on December 31, 1986.

> ". . . [E]ven the Supreme Court has acknowledged that certain government interests are so compelling that the state need not show that the means chosen is absolutely essential to further that interest, and that no lesser restrictive alternative could be substituted."

(A-37). The opinion relied on the less exacting free exercise test applied in the military setting in *Goldman v. Weinberger*, 475 U.S. ____, 106 S.Ct. 1325 (1986), finding that test to be equally applicable in free exercise cases which arise outside the military setting. (A-41).

Justices Riley, Levin and Cavanagh voted for reversal. Applying the standard of review in free exercise cases set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), their opinion concluded that the petitioners had stated a substantial claim of religious injury occasioned by imposition of the Act, and that the State had failed to carry its burden of proof that a compelling state interest dictated Michigan's requirement that a non-state-aided church-school must be shut down unless every one of its teachers was state-certified:

> "The state was unable to establish any relationship in fact between compliance with the administrative teacher certification rules and increased quality in teacher competence and student learning."

(A-98, n.57). The opinion noted that only six states (Michigan, Hawaii, Idaho, South Dakota, Iowa and Washington) impose state teacher certification on nonpublic schools. (A-98).

On December 30, 1986, the Supreme Court of Michigan denied petitioner's motion for rehearing. (A-156).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a state may shut down a church-operated school because of the church's refusal, on doctrinal grounds, to utilize solely state-licensed teachers. For two reasons the question is nationally significant and should now be addressed:

I. The Case Presents An Important Free Exercise Issue Not Yet Considered By This Court.

Previous decisions of the Supreme Court have dealt with the nature of church-operated schools. The Court has described the strictly church-controlled school as "an integral part of the religious mission of its sponsoring church" (*Lemon v. Kurtzman,* 403 U.S. 602, 616 (1971)), in which "a substantial portion of its functions is subsumed in its religious mission" (*Hunt v. McNair,* 413 U.S. 734, 743 (1973)), and in which the secular and religious mission are " 'inseparably intertwined'." *Meek v. Pittenger,* 421 U.S. 349, 361 (1975). Further, the Court has stressed that the "*raison d'etre*" of church-schools is "the propagation of a religious faith", *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 503 (1979), the role of the teacher in fulfilling that mission being "critical and unique." *Id.* at 501.

But while, in some opinions of the Court, general expression has appeared as to regulation which the state may impose on such schools, that expression has consisted solely of dicta and was made without benefit of an evidentiary record devoted particularly to that point. Never before has the Court accorded plenary review to a challenge, by a church-school, on Free Exercise and Establishment Clause grounds, to a specific state-dictated regulation restricting the freedom to choose its teachers. The dicta have appeared in cases in which a state sought to render all religious schools unlawful (*Pierce v. Society*

of Sisters, 268 U.S. 510 (1925))[8], or to make it a crime to teach German in any school (*Meyer v. Nebraska*, 262 U.S. 390 (1923))[9], or to provide public aid to religious schools (*e.g., Board of Education v. Allen*, 392 U.S. 236 (1968)[10], *Lemon, supra, Wolman v. Walter*, 433 U.S. 229 (1977)).[11]

But in the present case the petitioners challenge the power of a state to say that a church-school, irrespective of a long record of proved achievement and strong parent approbation, may not use a single non-state-licensed person to offer regular instruction to its pupils. The churches resist the statute on religious grounds. These grounds the trial court found to be material and sincere, with substantial injury resulting to the practice of petitioners' beliefs through imposition of the licensing requirement. (A-145). The case thus proceeded on the issues of compelling state interest and least restrictive means. On those issues the ample trial record, made

8. The Court in *Pierce* specifically noted that no question was raised therein "concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require . . . that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce*, 268 U.S. at 534.

9. *Meyer* involved a religious school but the challenge to the German language statute (under the Due Process Clause of the Fourteenth Amendment) was not presented on specific religious liberty grounds.

10. In *Allen*, which dealt with textbook loans to children in religious schools, the Court said that the state could insist that "attendance at private schools . . . be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Allen*, 362 U.S. at 245-246.

11. "The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction. . . and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman*, 433 U.S. at 240.

with testimony of nationally recognized educational experts, disproved the State's contention that its teacher-licensing program was of such critical societal necessity as to override the religious, parental and property rights maintained by petitioners. (J.A. 205a-222a, 276a-285a).

The case embraces two other questions of constitutional importance not yet considered by this Court: whether an individual has a free exercise right to pursue a religious vocation in the teaching of children in a church-school without a state license, and whether parents who desire a specific religious education for their children may be deprived of that opportunity, and their children shunted to schools unacceptable to them (J.A. 132a, 138a), because of a state requirement that a school must cease to exist if it will not bar non-licensed teachers from exercising their teaching function. Here again, a full-bodied record enables an exacting review of the questions. (J.A. 168a-172a (religious vocation), 130a-144a (parents)).

II. There Exists A Conflict In State Court Decisions With Respect To State Licensing Of Religious School Teachers.

Religious schools exist in all states of the nation. Their number is increasing due to the strong growth of Protestant schools in the past decade. State regulation of religious schools varies extremely in degree and coverage. Most states prescribe minimum curriculum requirements. The highest courts of seven states have lately reviewed, in light of Religion Clause challenges, state teacher-licensing requirements as applied to church-schools. The decisions are in conflict.

In three states in which state teacher licensing was part of a body of statutes governing nonpublic schools, religious schools bringing Free Exercise and Establishment challenges to the overall regulatory scheme were upheld. See *State of Vermont v. LaBarge*, 134 Vt. 226,

357 A.2d 121 (1976) (application of statute requiring that child be enrolled in state-"approved" school held violative, on Religion Clause grounds, of right of parent to chose non-"approved" religious school for child's education); *State of Ohio v. Whisner*, 47 Ohio St.2d 224, 351 N.E.2d 750 (1976) (application of state "minimum standards", including mandatory teacher certification, to religious school, held violative of Establishment Clause and school's free exercise rights); *Rudasill v. Kentucky State Board of Education*, 589 S.W.2d 877 (Ky. 1979), *cert denied*, 446 U.S. 938 (1980) (application of state teacher certification requirement to religious school held violative of state constitution's Bill of Rights provision that no person shall be compelled to send a child to a school to which he is conscientiously opposed).

Holding state teacher certification requirements constitutional as against free exercise challenges are *State of Nebraska ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed*, 454 U.S. 803 (1981); *State v. Rivinius*, 382 N.W.2d 270 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Johnson v. Charles City Community School Board of Education*, 368 N.W.2d 74 (Iowa 1985), *cert. denied sub nom. Pruessner v. Benton*, ____ U.S. ____, 106 S.Ct. 594 (1985); *Sheridan Road Baptist Church v. State of Michigan, Department of Education* (the present case).

In view of the widespread presence of religious schools in the nation and the seriousness of the free exercise problem presented in this petition (and potentially in many states), the conflict reflected in the above decisions should be resolved.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

APPENDIX A — OPINIONS — STATE OF MICHIGAN SUPREME COURT (November 24, 1986)

— Chief Justice Williams A-1

— Justices Boyle and Brickley, concurring .. A-23

— Justices Riley, Levin and Cavanagh, voting for reversal A-53

APPENDIX B — DECISION AND OPINION — STATE OF MICHIGAN COURT OF APPEALS (February 7, 1984) A-118

APPENDIX C — OPINION AND ORDER — CIRCUIT COURT FOR THE COUNTY OF INGHAM (December 29, 1982) A-142

APPENDIX D — JUDGMENT — CIRCUIT COURT FOR THE COUNTY OF INGHAM (January 12, 1983) A-153

APPENDIX E — ORDER — STATE OF MICHIGAN SUPREME COURT — Denying Motion for Rehearing (December 30, 1986) A-156

APPENDIX F — 1921 P.A. 302, §1 *et seq.*; M.C.L. §388.551 *et seq.*; M.S.A. §15.1921 *et seq.* ... A-158

APPENDIX G — 1976 P.A. 451; M.C.L. §380.1561; M.S.A. §15.41561 ..... A-163

APPENDIX H — Michigan Teacher Certification Code (1979 Mich. Adm. Code, R 390.1101 *et seq.*) A-165

APPENDIX A

STATE OF MICHIGAN
SUPREME COURT

Filed November 24, 1986

No. 73665

SHERIDAN ROAD BAPTIST CHURCH;
FIRST BAPTIST CHURCH BRIDGEPORT;
REVEREND GERALD SOMERO;
REVEREND RENE B. OUELLETTE;
WILLIAM L. SWAIN and SHARON
SWAIN, his wife; RONALD MUNSON and
JANICE MUNSON, his wife; and
MRS. SUSANNE KWAITKOWSKI,
Plaintiffs-Appellants,

v

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION;
and PHILLIP E. RUNKEL,
Superintendent of Public
Instruction,
Defendants-Appellees.

BEFORE THE ENTIRE BENCH (except Archer, *J.*).

WILLIAMS, *C.J.*

This case involves primarily a free exercise of religion challenge based on the First, Ninth and Fourteenth Amendments of the United States Constitution and art 1, § 4, and art 8, § 1, of the Michigan Constitution[1] to the

1. United States constitutional provisions:
"I. Congress shall make no law respecting an establish-

state statute requiring teachers in nonpublic schools to be certified by the state. The lower court also found that the regulations resulted in an Establishment Clause violation.

Specifically, the free exercise challenge is in two parts. The first part is phrased as follows in plaintiffs' reply brief:

> "To repeat: the Churches' point is not that a certified teacher may not teach in the Churches' schools' [sic]; it is that restricting the freedom of churches to engaging *only* government-certified

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NOTES *(Continued)*

ment of religion, or prohibiting the free exercise thereof;"

"IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Michigan constitutional provisions:

Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious beliefs." Const 1963, art 1, § 4.

Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Const 1963, art 8, § 1.

teachers in its school ministry is abhorrent to their Scriptural beliefs. It is not for the State to play theologian in this matter." (Emphasis in original.)

The second part involves objections to the teacher certification rules. The plaintiffs' reply brief states:

> "[T]he certification rules . . . intrude upon or threaten the operation of the church-schools in their selection of their teachers . . . . [T]he rules clearly evidence reservation of the ultimate State subjective control over important aspects of the making of a teacher in areas portending deep philosophical and religious differences between the plaintiff church-schools and prevailing secular philosophies concerning education matters. See, e.g., Roth testimony *supra* re 'skills essential to . . . inquiry in modern society.' "[2]

Using the balancing analysis developed by the United States Supreme Court in *Wisconsin* v *Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972), and *Sherbert* v *Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), we find that the state's interest in ensuring that *all* teachers have met certain minimum requirements outweighs the slight burden the regulatory scheme

2. Another issue raised in the briefs is the applicability of the emergency teacher permit provision. Defendants suggest that if religious schools were unable to find certified teachers who also met their religious qualifications, 1979 AC, R 390.1145 would allow emergency permits to be issued. Plaintiffs respond by noting that the regulation gives the *public* school authorities the ability to recommend that such permits be issued. They express some doubt about whether these officials would define emergency so as to include situations in which state certified and religiously qualified applicants were unavailable.

Because there is no evidence in the record that there is a shortage of certified teachers deemed religiously qualified by the plaintiffs or that the plaintiffs have been unable to fill their teaching positions, we offer no opinion as to the applicability of this provision in those circumstances.

poses to plaintiffs' free exercise rights. As applied, we find that the certification requirements are not discriminatory and do not require plaintiffs to adhere to any particular religious outlook. We also find that there is no Establishment Clause violation as the regulations do not lead to excessive entanglement between church and state.

We decline to reach the other issues initially raised by the plaintiffs as it appears they are no longer in controversy. Plaintiffs, both at oral argument and in their brief, and defendants at oral argument, indicated that there was agreement between the church and the state on the other points.[3]

I. FACTS

In September, 1979, the Department of Education, acting under the authority of the state's nonpublic school statute, 1921 PA 302, MCL 388.551 *et seq.*; MSA 15.1921 *et seq.*,[4] sought to obtain information about stu-

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3. "Both state and church herein are agreed that, as the State interprets the Michigan statutes, no constitutional issue with respect to curriculum, licensing, or the reporting of enrollment or courses of study is presented" (Plaintiffs' Reply Brief, p15).

4. "PRIVATE, DENOMINATIONAL, AND PAROCHIAL SCHOOLS

"Act 302, 1921, p 560; eff August 18.

"AN ACT to provide for the supervision of private, denominational and parochial schools; to provide the manner of securing funds in payment of the expense of such supervision; to provide the qualifications of the teachers in such schools; and to provide for the endorsement of the provisions hereof.

"*The People of the State of Michigan enact:*

"Sec. 1. The Superintendent of public instruction is hereby given supervision of all the private, denominational and parochial schools of this state in such matters and manner as is hereinafter provided. He shall employ such assistants and employes as may be necessary to comply with the provisions hereof and fix the compensation thereof; the number of assistants and employes and the compensation payable thereto being subject to the approval of the state administrative board. Such salaries and expenses shall be paid by

dent enrollment and teacher qualifications from two

the treasurer of the state of Michigan upon the warrant of the auditor general from the fund as herein designated, at such time and in such manner as other state officers and employes are paid. The superintendent of public instruction shall have the authority to remove any appointee under this act at any time that he may deem such removal advisable. It is the intent of this act that the sanitary conditions of such schools, the courses of study therein, and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state." MCL 388.551; MSA 15.1921.

"Sec. 2. A private, denominational or parochial school within the meaning of this act shall be any school other than a public school giving instruction to children below the age of 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state." MCL 388.552; MSA 15.1922.

"Sec. 3. No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state: Provided, however, That any person who shall have taught in any elementary school or shcools of the standard specified in this act for a period of 10 years or more preceding the passage of this act, shall, upon filing proof of service with the superintendent of public instruction, be entitled to a certificate by said superintendent of public instruction in such form as he shall prescribe, to teach in any of the said schools within the state: Provided further, That teaching in such schools shall be equivalent to teaching in the public schools for all purposes in obtaining a certificate: Provided further, That the teachers affected by this act may take any examination as now provided by law and that the superintendent of public instruction may direct such other examinations at such time and place as he may see fit. In all such examinations 2 sets of questions shall be prepared in subjects ordinarily written on Saturday, 1 of which sets shall be available for use on Wednesday by applicants who observe Saturday as their Sabbath; Provided further, That any certificate issued under or by virtue of this act shall be valid in any county in this state for the purpose of teaching in the schools operated under this act; Provided further, That any person holding a certificate issued by the authorities of any recognized or accredited normal school, college or university of this or other state shall be entitled to certification as now provided by law: Provided, however,

NOTES *(Continued)*

That teachers employed in such private, denominational or parochial schools when this act takes effect shall have until September first, 1925, to obtain a legal certificate as herein provided." MCL 388.553; MSA 15.1923.

"Sec. 4. In event of any violation of this act the superintendent of public instruction shall serve the person, persons, corporation, association or other agencies who operate, maintain and conduct a private, denominational or parochial school within the meaining of this act with a notice, time and place of hearing, such hearing to take place within 15 days after the date of said notice and at a place located in or conveniently near the county where such violation took place, accompanied by a copy of the complaint stating the substance of said violation: Provided, That no person shall be called to attend any such hearing on any day observed by him as the Sabbath. If at such hearing the superintendent of public instruction shall find that the violation complained of has been established he shall then serve said person, persons, corporation, association or other agencies with an order to comply with the requirements of this act found to have been violated within a reasonable time not to exceed 60 days from the date of such order: Provided, That in the event that such order refers to sanitary conditions that the said person, persons, corporation, association or other agencies shall have 6 months in which to remedy the defect. If the order of the superintendent of public instruction as specified in said notice shall not have been obeyed within the time specified herein said superintendent of public instruction may close said school and prohibit the said person, persons, corporation, association or other agencies operating or maintaining such private, denominational or parochial school from maintaining said school or from exercising any of the functions hereunder until said order of the superintendent of public instruction has been complied with. The children attending a private, denominational or parochial school refusing to comply with the requirements hereof after proceedings herein set forth shall be compelled to attend the public schools or approved private, denominational or parochial school under the provisions of the compulsory education act, the same being Act. No. 200 of the Public Acts of 1905, as amended. And it shall be the duty of the person or persons having charge of the enforcement of the said compulsory education act, upon notice from the superintendent of public instruction that said private, denominational or parochial school has not complied with the provisions hereof, to compel the attendance of the children of said school or schools at the public schools or approved private, denominational or parochial school." MCL 388.554; MSA 15.1924.

church schools. The schools refused to comply with the requests, and, as a result, the state scheduled an administrative hearing to determine whether the schools were in violation of the statute.

On December 6, 1980, the schools, the church pastors, members of the schools' faculties, and parents of children enrolled in the schools filed a declaratory action in the Ingham Circuit Court, alleging that the statute which the state sought to enforce was unconstitutional on the basis of the First, Ninth, and Fourteenth Amendments of the United States Constitution, and art 1, § 4, and art 8, § 1, of the Michigan Constitution (Joint Appendix, pp 22a-24a). Plaintiffs' request for a restraining order was granted, but subsequently vacated, after the state agreed to take no further action until the case was decided. On February 12, 1981, the defendants filed a counterclaim requesting that the court declare the nonpublic school statute constitutional on its face and as applied to the plaintiffs (Joint Appendix, p 45a).

A six-day bench trial was held in April before Judge Ray C. Hotchkiss. At trial, it was established that Sheridan Road Baptist Church operates the Sheridan Road Christian School, and that First Baptist Church of Bridgeport operates the Bridgeport Baptist Academy. Both schools offer a kindergarten through grade twelve program. The plaintiffs were identified as the church

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"Sec. 5. The superintendent of public instruction by himself, his assistants, or any duly authorized agent, shall have authority at any time to investigate and examine into the conditions of any school operating under this act as to the matters hereinbefore set forth and it shall be the duty of such school to admit such superintendent, his assistants or authorized agents and to submit for examination its sanitary condition, the records of enrollment of pupils, its courses of studies as set forth in section 1 of this act and the qualifications of its teachers. Any refusal to comply with provisions herein on the part of such school or teacher shall be considered sufficient cause to suspend the operation of said school after proceedings taken as stated in section 4 of this act."

schools, the pastors of the churches, and certain teachers at the schools and parents of students attending the schools (Joint Appendix, pp 59a, 118a, 130a, 168a, 172a).

In an opinion dated December 29, 1982, the trial court found that § 3 of 1921 PA 302, requiring teacher certification, was unconstitutional because it violated plaintiffs' free exercise rights and created excessive government entanglement with religion (Joint Appendix, pp 614a-615a).[5]

Defendants appealed this decision to the Court of Appeals which reversed the circuit court, holding that the certification requirements violated neither the Free Exercise nor the Establishment Clauses of the First Amendment.[6] *Sheridan Road Baptist Church v Dep't of Education*, 132 Mich App 1; 348 NW2d 263 (1984).

Plaintiffs' application for leave to appeal to this Court originally was denied, 419 Mich 916 (1984), but, after reconsideration, leave was granted on April 5, 1985, 422 Mich 857 (1985).

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5. The court also found § 1 of the act, requiring that "the courses of study [in private schools] and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state" was unconstitutional because of excessive government involvement with religion (Joint Appendix, 615a). Section 5 of the Act, providing for examination of school records to determine compliance with the act, was upheld, with the restriction that information obtained be used only for statistical or comparative purposes. Section 4 of the act, providing for hearings and sanctions for violations of the act, was upheld.

6. The court also found that the curriculum requirements were constitutional and that the trial court had erred in limiting the purposes for which statistical data from nonpublic schools could be used. Plaintiffs' contentions that the regulatory scheme was vague or that it created a danger of future abuses were not accepted by the court.

II. FREE EXERCISE OBJECTION TO CERTIFICATION

A. State System of Regulation

The Legislature has determined that teachers in *all* schools in the state must be certified. MCL 388.551; MSA 15.1921 and MCL 388.553; MSA 15.1923, respectively, provide in relevant parts.

> "It is the intent of this act that the sanitary conditions of such schools, the courses of study therein, and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state."

> "No person shall teach or give instuction. . . in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state. . . ."

The regulations governing teacher qualifications are promulgated by the State Board of Education and contained in the Teacher Certification Code, 1979 AC, R 390.1101 *et seq.*, 1981 AACS, R 390.1101 *et seq.* In order to obtain a provisional teaching certificate,[7] an applicant must demonstrate the following:

> 1) completion of at least forty semester hours in a program of general or liberal education and demonstration of an acquaintance with the substance, concepts, and methods of the principal areas of human knowledge and skills essential to communications and inquiry in modern society;

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7. Upon receiving a degree from an undergraduate institution, an applicant is entitled to only a *provisional* certificate. To acquire a continuing certificate, a teacher must complete three years of successful teaching and complete 18 post-graduate semester hours or obtain a masters degree. 1981 AACS, R 390.1132.

2) completion of a program providing for depth in the substantive field to be taught;

3) completion of twenty semester hours in education courses (including at least six hours of directed teaching);

4) completion of a major of at least thirty semester hours and a minor of twenty semester hours (or for an elementary certificate completion of *either* a major of at least thirty semester hours *or* three minors of twenty semester hours each);

5) a bachelor's degree obtained from an approved Michigan college or university or an acceptable certificate issued by another state.

Under these regulations, the State Board of Education has issued thousands of provisional certificates to out-of-state college graduates, including graduates of Catholic and fundamentalist Christian schools (Joint Appendix, p 300a).

B. Test for Analyzing Free Exercise Objections to State Regulations

The United States Supreme Court has developed a method of analyzing free exercise objections to state statutes. The following three quotations will serve as a basis for our development of a four-part test for this analysis.

The first quotation is from *Wisconsin v Yoder*, 406 US 215, and reads as follows:

"[T]o have the protection of the Religious Clauses, the claims must be rooted in religious belief."

The second quotation is from *Sherbert v Verner*, 374 US 403, and reads as follows:

"If therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary [of unemployment compensation] represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' *NAACP v Button*, 371 US 415, 438 [83 S Ct 328; 9 L Ed 2d 405 (1963)]."

The third quotation is also from *Sherbert*, 374 US 407, and reads as follows:

"[I]t would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

From these three quotations we derive the following four rules with which to analyze the instant case:

1. Plaintiffs' "claims must be rooted in religious belief." *Yoder*.

2. If the regulation poses "no infringement by the State of [plaintiffs'] constitutional right [ ] of free exercise," *Sherbert*, the regulations will be upheld. If the regulation is upheld for this reason, rules three and four are inapplicable.

3. "[A]ny incidental burden on the free exercise of [plaintiffs'] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' " *Sherbert*.

4. No less obtrusive form of regulation is available to the state. *Sherbert*.

1. The Religious Nature of the Claims

There is no dispute as to the religious nature of the plaintiffs' objections to the certification requirement. The trial court found that

> "[p]laintiffs are members of the Fundamentalist Christian movement. . . . The fundamentalist movements believes the church to be not only a place of worship but [a] place for instruction of the young. An outgrowth of this belief is the belief that the school is an extension of the church or a ministry of the church. . . . As fundamentalists, plaintiffs object to state regulation of their schools which they consider a mission ordained by God. They further object to the certification of their teachers, believing that the course of study required to obtain a certificate teaches a humanistic rather than a religious approach to education." (Joint Appendix, p 611a).

Defendants note on page 12 of their brief that they agree that plaintiffs' objections to the statute are premised on their religious beliefs.

2. Burden on Free Exercise Rights

The churches advance two ways in which the regulations burden their religious interests. The primary objection is that "no one may carry out a teaching ministry in a church-school without a government permit to do so" (Plaintiffs' Reply Brief, p 8). We accept plaintiffs' claim that such licensing has an effect on their free exercise rights, and we therefore must determine whether this burden is outweighed by a compelling state interest. Second, they object to the discretion given to the state to determine whether an applicant is qualified to receive a provisional teaching certificate. The regulations require an applicant to demonstrate "an acquaintance with the substance, concepts, and methods of the principal areas

of human knowledge, and skills essential to communication and inquiry in modern society." 1979 AC, R 390.1122. Other portions of these regulations enable the state to implement this with virtually unlimited discretion because it is the board which determines the acceptability of particular courses from out-of-state institutions, the acceptability of out-of-state candidates with certificates from their states and the acceptability of the educational institutions themselves in Michigan.[8] We acknowledge that the regulation *could* be applied in a manner which discriminates against those taught at religious colleges or universities.

The other plaintiffs also testified about the burden certification posed to them. A teacher at the Bridgeport Baptist Academy testified at trial that her rights would be infringed upon if she were forced to comply with the state certification requirements since attending courses taught at a state-approved school would force her to violate the Biblical command not to listen to instruction causing one to err (Joint Appendix, p 169a). She stated that if compliance with the statute were ordered, she would be unable to fulfill her religious calling to teach (Joint Appendix, p 168a). Parents of children attending the church schools stated that they would not want their

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8. 1979 AC, R 390.1115 provides:

"The state board reserves the right to determine the acceptability of credits presented for certification from approved teacher education institutions located in other states."

1979 AC, R 390.1125 provides:

"An applicant for a provisional certificate shall have been granted a bachelor's degree and shall be recommended by a Michigan college or university approved for teacher education by the state board."

1979 AC, R 390.1130 provides:

"The state board *may* issue a provisional certificate to a person who has, or who is reported eligible for, a teaching certificate issued by the certificating authority of any state in which requirements for certification are deemed equivalent to those in effect in this state." (Emphasis added.)

children taught by those who were themselves taught other philosophies (Joint Appendix, p 132a). For reasons discussed later, we do not find these claims to be supported by the record.

3. Compelling State Interest in Education

In *Sherbert*, 374 US 403, the United States Supreme Court stated that if there were any "incidental burden" on a free exercise right, it must "be justified by a 'compelling state interest within the State's constitutional power to regulate. . . .' "

There is no doubt that a state has a compelling interest in the education of its citizens. In *Pierce v Society of Sisters*, 268 US 510, 534; 45 S Ct 571; 69 L E 1070 (1925), the Court, while ruling that a state cannot compel all students to be educated in public schools, noted that

> "[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."

In *Brown* v *Topeka Bd of Ed*, 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954), the Supreme Court again emphasized the magnitude of the state's interest:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the

> armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

Finally, in *Central Dist No 1 Bd of Ed* v *Allen*, 392 US 236, 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968), the Supreme Court explicitly acknowledged the state's interest in *private* schools:

> "[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. . . . [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

Michigan particularly has a significant and deeply-rooted interest in education. Our Constitution, art 8, § 1, reflects the language of the Northwest Ordinance of 1787:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Governor James Blanchard elaborated on this in his January 18, 1984, State of the State address:

> "For decades, the promise of education has been the ladder of opportunity in this state. Hard-working

> people, honest people, lived here or came here, knowing that they themselves could earn a decent living working with their hands — but even more important, that their children could find an even better future working with their minds because of Michigan's fine schools and colleges and universities."

See also *Michigan Female Seminary* v *Secretary of State*, 115 Mich 118, 120; 73 NW 131 (1897) ("It has always been the policy of this State, as indicated by the provisions of its Constitution and a long line of legislative enactments, to encourage the cause of education.").

It is clear that Michigan's interest in education is long-standing and of the highest importance.

A compelling state interest in education does not necessarily justify *all* forms of educational regulation. For example, in *Yoder*, 406 US 236, the United States Supreme Court balanced the religious claims of the Amish against the state's interest in requiring compulsory education until age sixteen. The Court concluded that despite the state's "admittedly strong interest in compulsory education," it had failed to demonstrate with sufficient particularity how its interest would be adversely affected by granting an exemption to the Amish. The Court placed great emphasis on the adequacy of the Amish vocational education alternative to secondary education, the fact that the Amish children were not going to live in society at large, but in a closed, farming society, and the fact that compulsory high school education could ultimately destroy the Amish community. *Yoder*, 406 US 212. None of these factors are relevant in this case, and, more importantly, the state's interest here is not how much time should be spent in school, but the qualifications of the teachers themselves.

The state's interest in education necessarily extends to an interest in teachers because a primary and vital ingredient to a good education is good teachers. James

Garfield expressed this sentiment in the following manner:

> "I am not willing that this discussion should close without mention of the value of a true teacher. Give me a log hut, with only a simple bench, Mark Hopkins on one end and I on the other, and you may have all the buildings, apparatus and libraries without him." (Address to Williams College Alumni, New York, December 28, 1871.) Bartlett's Familiar Quotations (14th ed), p 741a.

Michigan has long recognized the importance of qualified teachers. In 1843, O. C. Comstock, Superintendent of Public Instruction, stated:

> "Eligible teachers are all-important. This fact is now more deeply and generally impressed on the public mind than formerly. . . . It was once imagined that almost every man of a competent education could teach a school. But to this proposition there are many exceptions. It does not follow that because a man has received a liberal education, he is therefore a lawyer or physician. . . . And, by parity of reasoning, it is plain that an acquaintance with general literature and science does not, of necessity, prepare one for the arduous but delightful business of educating the underlying mind. Such preparation is chiefly derived from the study of the science and art of teaching." Jackson, *State Control of Public Instruction in Michigan* (1926) (*Jackson*); pp 154-155 (quoting O. C. Comstock). (Brief of Amicus Curiae Michigan Federation of Teachers, AFL-CIO.)

Therefore, to the extent that certification of teachers furthers education, it can be considered a compelling state interest. Those certification requirements which involve gaining expertise in a particular substantive field, taking classes in a program of general or liberal education, student teaching and taking a few basic

courses in education, are clearly aimed at and closely related to the goal of producing competent teachers.[9]

4. State's Interest Outweighs the Minimal Infringement

While complying with the certification requirements may mean that schools will have a smaller pool of applicants from which to select their teachers, there is no evidence that acceptable, certified people are not available. Parents have stated that they have no religious objection to having their children taught by certified teachers as long as they are also religiously acceptable to them (Joint Appendix, pp 91a, 134a, 176a-177a). Religious school teachers may have to receive more training in order to become certified, but the regulations do not require anyone to attend courses taught from a perspective contrary to their beliefs. The teachers can fulfill all the state certification requirements while attending either a religious or nonreligious institution. For these reasons, we find the infringement on free exercise rights is minimal and is outweighed by the state's interest.

Other state courts confronted with religious objections to the state certification of teachers have found for the state. In *State* v *Rivinius*, 328 NW2d 220 (ND, 1982), cert den 460 US 1070 (1983), the North Dakota Supreme Court balanced the state's interest in education against parents' right to educate their children in the religion of their choice. The court found that the state law,

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9. As one writer has noted:

"It can . . . be assumed that a teacher with a college degree will in almost all cases be a better teacher than one with little or no education. The teacher with a college degree, has, at the very least, demonstrated the mastery of certain basic skills." Baker, *Regulation of fundamentalist Christian schools: Free exercise of religion v the state's interest in quality education*, 67 Ky L J 415, 427 (1979).

which included a requirement that all teachers be certified by the state, did impose a burden on religion. However, the court found that the compelling state interest in education "outbalances the resulting strain or imposition on the defendants' religious beliefs." *Rivinius*, 328 NW2d 229. The court relied in part on the fact that there was no evidence suggesting that a certified teacher was unable to teach in a manner consistent with the religious beliefs of the parents. See also *Nebraska* v *Faith Baptist Church*, 207 Neb 802; 301 NW2d 571 (1981), app dis 454 US 803 (1981) (state law requiring a baccalaureate degree as a prerequisite to teaching at any school upheld); *State* v *Shaver*, 294 NW2d 883 (ND, 1980) (certification requirement upheld, in part because religious convictions of the parents did not prohibit the use of certified teachers). Cf. *Kentucky State Bd of Ed* v *Rudasill*, 589 SW2d 877, 879, n 3 (Ky, 1979), cert den 446 US 938 (1980) (certification requirements for private school teachers held unconstitutional under the *state* constitution. The court noted, "it is obvious that Section 5 of the Kentucky Constitution is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment").

5. The Regulations Have Not Been Applied in a Discriminatory Manner

The plaintiffs' second allegation is that the certification regulations give the board the power to withhold certificates on the basis of an applicant's religious beliefs. Those portions of the regulations, discussed in Part II(B)(2), which give the board the discretion to grant or withhold a certificate on the basis of vague and subjective criteria certainly could be applied in a discriminatory manner. Such provisions are also less clearly related to the state's goal of producing competent teachers. However, there is no evidence that any applicant who has fulfilled the objective requirements has been denied a

certificate because of religious beliefs. Graduates of religious institutions, including both fundamentalist Christian and Catholic schools, have been certified. We assume from this that the board is concerned with the applicant's compliance with the objective requirements and that it does not attempt to determine whether an applicant has a "humanistic" world view or has taken courses taught from that perspective. We therefore find that the certification regulations, as applied, directly further the state's interest in education and do not enable the board to discriminate on the basis of religious beliefs.

6. No Less Intrusive Method is Available to the State

We are also satisfied that there is no less intrusive method by which the state could satisfy its interest in the education of its citizens. The only alternative which has been proposed is standardized testing of private school students. This is an inadequate substitute because deficiencies in teaching would be discovered only after the damage has occurred. *North Dakota* v *Shaver*, 294 NW2d 883 (ND, 1980). Further, we are not persuaded that testing would guarantee less intrusion by the state into the functioning of the private schools. See, e.g., *Rivinius, supra*, 328 NW2d 229. See also *Johnson* v *Charles City Community Schools*, 368 NW2d 74, 79 (Iowa, 1985), cert den ____US ____; 106 S Ct 594 (1985) ("[w]hatever limitations are imposed on the state's general right and duty to see to the education of its youth, the right extends beyond occasional testing").

III. OBJECTION TO CERTIFICATION REQUIREMENT ON THE BASIS OF THE ESTABLISHMENT CLAUSE

In *Lemon* v *Kurtzman*, 403 US 602, 612; 91 S Ct 2105; 29 L Ed 2d 745 (1971), the Supreme Court stated

that in order to survive an Establishment Clause challenge, a statute must meet a three-part test:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'" (Citations omited.)

See also *Grand Rapids School Dist* v *Ball*, ____US ____; 105 S Ct 3216, 3223; 87 L Ed 2d 267, 277 (1985) ("We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria").

The parties here have not discussed the first two parts of this test because it is clear that the statute involved in this case has a secular purpose and that it does not have a primary effect of either advancing or inhibiting religion. With respect to the third part of the test, the circuit court found that teacher certification did cause excessive government entanglement with religion.

In reviewing this conclusion, we are aware that the United States Supreme Court has stated:

> "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." *Lemon*, 403 US 614 (citations omitted).

Those kinds of state actions which have been found to violate this third prong are those which create "an intimate and continuing relationship between church and state." *Lemon*, 403 US 622. See also *Walz* v *New York City Tax Comm*, 397 US 664; 90 S Ct 1409; 25 L Ed 2d

697 (1970); *Wolman* v *Walker*, 433 US 229; 97 S Ct 2593; 53 L Ed 2d 714 (1977) (finding that the use of state funds for nonpublic school field trips would require close supervision of the nonpublic school teachers, thus creating excessive entanglement).

In this case, it is clear that requiring all teachers to be certified does not impermissibly tangle government with religion. The state is merely enforcing minimum standards with regard to individuals. The requirement does not involve the government in any continuing relationship with the churches or the schools. Once the individual teacher is certified, the state does not require the individual to teach from any particular perspective. We find, therefore, that there is no unconstitutional government entanglement with religion.

IV. CONCLUSION

We agree with the Court of Appeals that requiring all teachers in the state to be certified is not unconstitutional. Neither the Free Exercise nor the Establishment Clauses of the First Amendment support claims to the contrary.

/s/ G. Mennen Williams

STATE OF MICHIGAN
SUPREME COURT

No. 73665

Filed November 24, 1986

SHERIDAN ROAD BAPTIST CHURCH; FIRST BAPTIST CHURCH BRIDGEPORT; REVEREND GERALD SOMERO; REVEREND RENE B. OUELLETTE; WILLIAM L. SWAIN and SHARON SWAIN, his wife; RONALD MUNSON and JANICE MUNSON, his wife; and MRS. SUSANNE KWAITKOWSKI,
Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; and PHILLIP E. RUNKEL, Superintendent of Public Instruction,
Defendants-Appellees.

BOYLE, *J. (concurring).*

While we concur in the result reached by the opinion for affirmance, we write separately to expand both on the nature of the balancing test which we believe appropriate in the instant case, and on the issue which divides the Court. The analysis which follows is an effort to distill from prior precedent those principles which will inform our obligation both to "move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable

educational requirements," *Wisconsin* v *Yoder*, 406 US 205, 235; 92 S Ct 1526; 32 L Ed 2d 15 (1972), and to assure that government authority not improperly inhibit the religious freedom guaranteed by the First Amendment.

I
THE STANDARD OF REVIEW

Primarily at issue in this case is whether the teacher certification requirement imposed by the state impinges upon the plaintiffs' First Amendment right of freedom of religion. According to plaintiffs, also at issue are the fundamental rights of parents to guide the religious future and education of their children, see *Pierce* v *Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925); as well as the First Amendment right to express, transmit and receive ideas, see *West Virginia State Bd of Ed* v *Barnette*, 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943), and the liberty to impart and receive religion, see *Cantwell* v *Connecticut*, 310 US 296, 307; 60 S Ct 900; 84 L Ed 1213 (1940); *Widmar* v *Vincent*, 454 US 263; 102 S Ct 269; 70 L Ed 2d 440 (1981).

The foregoing claims are distinct and separate, and, if brought individually, the claims would not be reviewed under the same standard. The First Amendment claims would be reviewable under a strict scrutiny or compelling state interest standard.[1] The standard of review for the Fourteenth Amendment interest of the parents appears to be in a state of flux,[2] but in no case would the standard be higher than that commanded by the First Amendment claims. It follows, therefore, that because the claims are brought together, should plaintiffs' free

1. See, e.g., *Wisconsin* v *Yoder*, *supra*, (free exercise claim), and *United States* v *O'Brien*, 391 US 367; 88 S Ct 1673; 20 L Ed 2d 672 (1968) (free speech claim).

2. See *Pierce* v *Society of Sisters*, *supra*, compare *Wisconsin* v *Yoder*, *supra*. See also *Project, education and the law: State interests and individual rights*, 74 Mich L R 1373, 1434-1435 (1976).

exercise challenge not prevail, plaintiffs' other claims could not succeed. Moreover, if plaintiffs' free exercise claims are successful, the need to review plaintiffs' other claims becomes moot. Therefore, we confine our analysis to plaintiffs' free exercise challenge.

The standard for evaluating free exercise claims has not been consistently articulated by the United States Supreme Court.[3] Despite that fact, two constant principles can be identified.

"First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated 'compelling,' 'of the highest order,' or 'overriding.' Second, the government must show that

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3. Justice O'Connor summarized the various ways the standard has been articulated in *Goldman* v *Weinberger*, 475 Us ____, ____; 106 S Ct 1310, 1324; 89 L Ed 2d 478, 498 (1986) (O'Connor, J., dissenting).

"In *Sherbert* v *Verner*, 374 US 398 [83 S Ct 1790; 10 L Ed 2d 965] (1963), and *Thomas* v *Review Board*, 450 US 707 [101 S Ct 1425; 67 L Ed 2d 624] (1981), the Court required the States to demonstrate that their challenged policies were 'the least restrictive means of achieving some compelling state interest' in order to deprive claimants of unemployment benefits when the refusal to work was based on sincere religious beliefs. *Thomas*, *supra*, at 718. See also *Sherbert*, *supra*, at 406-408. In *Wisconsin* v *Yoder*, 406 US 205, 215 (1972), the Court noted that 'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion' in deciding that the Amish were exempt from a State's requirement that children attend school through the age of 16. In *United States* v *Lee*, 455 US 252, 257-258 [102 S Ct 1051; 71 L Ed 2d 127] (1982), the Court stated that '[t]he State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest,' and held that the Amish could not exempt themselves from the Social Security system on religious grounds. See also *Gillette* v *United States*, 401 US 437 [91 S Ct 828; 28 L Ed 2d 168] (1971) (rejecting claims under the Establishment and Free Exercise Clauses to the Federal Government's refusal to give conscientious-objector status to those objecting on religious grounds only to a particular war rather than to all wars)."

granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the 'least restrictive' or 'essential,' or that the interest will not 'otherwise by served.' " *Goldman* v *Weinberger*, 475 US ____, ____; 106 S Ct 1310, 1325; 89 L Ed 2d 478, 498 (1986) (O'Connor, J., dissenting).[4]

The difficulty in articulating a standard for free exercise claims pales considerably in comparison to the difficulty encountered in the application of the standard. At a minimum, application of the standard is a balancing process requiring great circumspection in performing the sensitive and delicate weighing of a state's legitimate social interest and a request for a religious exemption.[5]

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4. Compare *United States* v *O'Brien, supra*, 376-377:

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged comunicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it."

5. See *Wisconsin* v *Yoder, supra*, 235.

Contrary to the opinion for reversal, we do not believe that the belief/action and direct/indirect interference dichotomies have long been abandoned when it is necessary to determine the scope of protections afforded by the First Amendment.[6] Indeed, the former has been reiterated and the latter debated in an opinion issued by the United States Supreme Court on June 11, 1986.[7]

The Freedom of Religion Clause of the First Amendment embraces two concepts — the freedom to believe and the freedom to act.

"The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v *Connecticut*, 310 US 296, 303-304; 60 S Ct 900; 84 L Ed 1213 (1940).[8]

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6. "Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct which is not absolute." *Bowen* v *Roy*, ____ US ____; 106 S Ct 2147, 2152; ____ L Ed 2d ____ (1986).

7. While Justice Brennan's opinion for the Court in *Sherbert* v *Verner*, n 3 *supra*, would appear to have eliminated the distinction, the controversy between Justice Burger and Justice O'Connor in *Bowen* v *Roy*, n 6 *supra*, demonstrates that the issue still has vitality.

8. "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. . . . But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin* v *Yoder*, *supra*, 220 (citations omitted).

Where the regulation involved conflicts directly with a religious practice, "accomodation between the religious action and an exercise of state authority is a particularly delicate task, [*Prince* v *Massachusetts*, 321 US 158, 165; 64 S Ct 438; 88 L Ed 645 (1944)], because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld* v *Brown*, 366 US 599, 605; 81 S Ct 1144; 6 L Ed 2d 563 (1961). But where the burden on the exercise of religion is indirect, i.e., the legislation does not make the religious practice itself unlawful, the most critical scrutiny must be employed or the operating latitude of the legislature would be severely restricted. *Id.*, 606.

Admittedly, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion," *Wisconsin* v *Yoder*, *supra*, 220, citing *Sherbert* v *Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), that is, if, although indirect, the effect of the regulation is to put "substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . ." *Thomas* v *Review Bd of Indiana*, 450 US 707, 718; 101 S Ct 1425; 67 L Ed 2d 624 (1981). However, if the state regulates conduct by enacting a neutral law within its power, the purpose and effect of which is to further the state's secular goals, the statute may be valid despite its indirect burden on religious practice unless the state's purpose may be achieved through less burdensome means. *Braunfeld* v *Brown*, *supra*, 607.[9]

The fundamental issue which divides this Court is the nature of the proofs required by the parties in order

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9. Despite the accusation of the opinion for reversal, we do not suggest that "legislation which imposes only indirect burdens upon the free exercise of religion . . . is *outside* the protections afforded by the Free Exercise Clause, or that such legislation mandates a lower level of judicial scrutiny . . . ." Slip op p 44.

to satisfy their respective burdens in this free exercise case, an issue which the United States Supreme Court has not directly addressed.[10] In our judgment, it is apparent from Supreme Court precedent that the extent and nature of the burden imposed by the enforcement of the regulation is relevant to the kind and quantity of proofs required by the government to satisfy the strict scrutiny test. Cf. *Wisconsin* v *Yoder, supra; United States* v *Lee*, 455 US 252; 102 S Ct 1051; 71 L Ed 2d 127 (1982); *Braunfeld* v *Brown, supra*, and compare *Goldman* v *Weinberger, supra*. It also appears that a belief/action and direct/indirect analysis remains indispensable to the delicate balancing required of this Court because this analysis relates to both the degree that the regulation is neutral and the degree to which the challenged regulation interferes with the religious practice or belief.[11]

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10. In *State* v *Patzer*, 382 NW2d 631 (ND, 1986), cert den ____ US ____; 107 S Ct 99 (1986), the North Dakota Supreme Court found for the state in spite of the fact that the state did not formally introduce any evidence during the lower court proceedings relating to "compelling state interest" and "least restrictive means." The defendants in that case unsuccessfully sought leave to appeal to the United States Supreme Court raising three questions for that Court's consideration.

> "(1) Can the state satisfy its burden of establishing compelling state intertest if it introduces no evidence of any kind to substantiate its assertions of such interest? (2) Is there proof that compelling state interest is served when there is no specific or academic evidence that children learn better from certified teachers than when they are taught by their uncertified parents at home? (3) Has North Dakota chosen the least restrictive alternative to assure its interests in education, in view of [the] fact that all 22 states enacting home school laws in [the] past 30 years have not made such [a] requirement?" 55 USLW 3101 (August 12, 1986).

11. See also Baker, Comments, *Regulation of fundamentalist christian schools: Free exercise of religion v the state's interest in quality education*, 67 Ky L J 415, 417-420 (1978-1979).

The opinion for reversal characterizes as "inescapable" the conclusion that the certification requirement is a direct regulation of plaintiffs' religious activity. The opinion thereby eschews examination of the nature and extent of the burden on plaintiffs' First Amendment rights and proceeds directly to application of the compelling state interest analysis. Our colleague's characterization of the nature of these claims seems to follow from the willingness to accept the premise that all state regulation of religious schools is a direct restraint on religious liberty.

While taking us to task for allegedly interpreting plaintiffs' religious beliefs and requirements, our colleague herself characterizes the religious burden in a manner which inexorably dictates the conclusion.[12] No

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12. In *Illinois State Board of Elections* v *Socialist Workers Party*, 440 US 173, 188-189, 99 S Ct 983; 59 L Ed 2d 230 (1979), a case concerning the First Amendment right to associate, Justice Blackmun wrote:

"Although we join the Court's opinion and its strict-scrutiny approach for election cases, we add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' . . . we have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

"I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and we must endeavor to disassociate myself from them." (Citations omitted.)

less than three times does the opinion for reversal characterize the burden on plaintiffs' religious beliefs as "substantial." Slip op, pp 24, 27, 30. A court may not interpret an individual's religious beliefs or requirements, *United States* v *Lee, supra,* 257; *Thomas* v *Review Bd of Indiana, supra,* 716. However, unless an allegation of a burden on a sincerely held religious belief is to automatically require invalidation of a governmental regulation, a court must analyze the degree of the burden.[13]

A

Plaintiffs' primary objection to the teacher certification requirement is that "no one may carry out a teaching ministry in a church-school without a government permit to do so. . . ." Plaintiffs do not contend that they were denied a certification to teach upon the basis of their religious beliefs. Were this the basis of their objections, plaintiffs would be clearly entitled to relief, for "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel* v *Paty,* 435 US 618, 626; 98 S Ct 1322; 55 L Ed 2d 593 (1978).

Slightly rephrased, plaintiffs objection is that they are precluded from teaching on the basis of their uncertified *status.* By Michigan law, the certified status involved here is defined in terms of conduct, not belief.[14]

More recently, in *Bowen* v *Roy,* n 6 *supra,* 106 S Ct 2156, n 17, three other justices expressed doubt concerning the propriety of applying strict scrutiny to Free Exercise claims. See n 21.

13. In our view, the certification requirement can only be viewed as a direct restraint on plaintiffs' free exercise rights if the contention is accepted that all secular regulation of private religious schools violates the First Amendment, a conclusion which is unsupported by any previous precedent.

14. See Williams, J., slip op, p 8.

Because the state requirement is focused on status, conduct, and acts, this Court "should be cautious in expanding the *scope* of [the abolute protections afforded belief by the First Amendment] since to do so might leave government powerless to vindicate compelling state interests." *McDaniel* v *Paty, supra,* 627, n 7 (emphasis supplied).[15]

B

The burden on plaintiffs' religious practices is also indirect. The pastors' primary objection to teacher certification is their belief that God has given them the criteria by which to discern who should teach their children, and that licensure itself is an infringement on their religious liberty. Plaintiffs' religious tenets do not prohibit them from hiring a teacher simply because the teacher is certified. The record establishes that certified teachers are employed by the schools.[16] Further, while there was testimony indicating that plaintiffs believe courses of study leading to certification teach a humanistic, rather than a religious approach to religion, the record does not establish and indeed belies the conclusion that pursuing such courses compromises in any way the plaintiffs' ability to teach from a religious point of view.[17] Rather, the burden asserted, in plaintiffs' own

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15. Cf. *Wisconsin* v *Yoder, supra,* 234-235; *Braunfeld* v *Brown, supra,* 606.

16. Plaintiff Sharon E. Swain, a parent whose children attend Bridgeport Baptist Academy, testified that she had no religious objection to having her children taught by a person possessing a Michigan teacher's certificate. Testimony to a similar effect was elicited from Michael D. Cox and Gregory and Susan Boese, also parents of children in attendance at the school.

Gerald M. Somero, pastor of Sheridan Road Baptist Church, testified that a certified teacher could teach at the church school without violating the tenets of the church, and that the church school currently employed a certified teacher.

17. The record indicates that William Swain, a teacher at the Bridgeport school at the time testimony was taken in this case, did

words, is that "engaging *only* government certified teachers in its school ministry is abhorrent to their scriptural beliefs." Although every First Amendment objection based on the religious clauses involves an objection to governmental compulsion, in this case it is not the certification that is "abhorrent," but the possibility that the government certification requirement will limit the pool of individuals from which the schools can hire their teachers.

This objection, although couched in religious terms, borders on secular concerns. The economic and administrative burden imposed by the certification requirement is clearly more palpable than the burden on plaintiffs' religion. According to the record, there are religious institutions in existence which provide the classes required for certification and which teach the classes in a manner unobjectionable to plaintiffs religious beliefs. Moreover, it may be possible for teachers at the schools to satisfy the educational requirements for certification by presenting evidence of an equivalent as determined by the state board such as college graduation, standardized examination scores, prior teaching experience or any combination of these or other appropriate criteria. 1979 AC, R, 390.1152. Plaintiffs' teaching mission appears, therefore, more inconvenienced by the certification requirement rather than precluded.

Without doubt, an integral part of plaintiffs' beliefs is that it is their duty and right to educate their children in the manner they believe is best for their children. Our

possess a Michigan teaching certificate. Iris Kwiatkowski, also a teacher at the Bridgeport school, testified that she received a South Carolina teacher's certificate upon her graduation from the Bob Jones University in Greenville, South Carolina. She further testified that she only needed a Michigan history course in order to be eligible for a Michigan teacher's certificate. Although Ms. Kwiatkowski claimed that she would not pursue a Michigan teacher's certificate because she did not want to "listen to instruction that causes [her] to err," she did not testify that certification would affect her ability to pursue her teaching ministry.

respect for the sincerity of their beliefs does not, however, require us to lose sight of the fact that the education of plaintiffs' children is also a well-established compelling concern and a constitutional interest of the state, Const 1963, art 8, § 1.[18] The United States Supreme Court has long recognized that the parents right to educate their children in the school of their choice is subject to the state's interest in assuring that every child receive at least a minimal education.[19] Moreover, regulation of the teaching profession is a recognized and identifiable means of furthering that state interest. See *Bd of Ed* v *Allen*, 392 US 236; 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968).

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18. *Wisconsin* v *Yoder*, *supra*, p 213. See also *Pierce* v *Society of Sisters*, *supra*, 534; *Brown* v *Bd of Ed*, 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954).

19. In *Bd of Ed* v *Allen*, 392 US 236, 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968), the United States Supreme Court explained the relationship between the two interests:

"In the leading case of *Pierce* v *Society of Sisters*, 268 US 510 (1925), the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce* v *Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

II
THE BALANCING PROCESS DESCRIBED

The standard for free exercise claims is a balancing test which countenances shifting burdens of persuasion in proportion to proofs admitted at trial. For example, once a plaintiff has established that a regulation burdens the exercise of religion, the state must establish that a "compelling state interest" is at issue and that the interest cannot otherwise be served. If the plaintiff sets forth alternative means which rebut the government's claim of necessity, then the state is required to show with more particularity that no lesser restrictive alternative is available. Compare *Wisconsin* v *Yoder, supra*, 234-236.

The balancing process which is required has been diversely described by the United States Supreme Court.[20] In *Sherbert* v *Verner, supra*, 403, the Court applied traditional "strict scrutiny" review and required that a governmental regulation which burdens the free exercise of religion be justified by a "compelling state interest."[21] In *Wisconsin* v *Yoder, supra*, 214, the Court

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20. See n 3.

21. While the strict scrutiny standard as variously described remains the appropriate standard and is applied in the case at bar, this test has also been recently criticized by three justices of the United States Supreme Court in the free exercise context:

"It is readily apparent that virtually every action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day). Accordingly, if the dissent's interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a 'compelling government interest.' While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended." *Bowen* v *Roy*, n 6 *supra*, 106 S Ct 2156, n 17 (opinion of Chief Justice Burger, with Justices Powell and Rehnquist concurring).

Chief Justice Burger's comment appears to be based in part upon the expansive view of religion taken by the Supreme Court in

required a showing of a "sufficient" state interest to override the burdened religious interest. See also *United States* v *Lee*, 455 US 252, 257-258; 102 S Ct 1051; 71 L Ed 2d 127 (1982). One commentator has observed that the Court's failure to use the "compelling state interest" language "suggest[s] the use of a more open balancing test." Nowak, Rotunda & Young, Constitutional Law (2d ed), p. 1060.

At least one member of the United States Supreme Court has posited that the majority of decisions has placed "an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes [or prescribes] conduct that his religion prescribes [or proscribes]. . . ."[22] Although this is the pronounced view

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NOTES *(Continued)*

Free Exercise cases. While the Court has expressed the view that beliefs based on secular considerations are not entitled to the same deference as beliefs based on religious concerns, see *Wisconsin* v *Yoder*, *supra*, 215-216, cf. *Braunfeld* v *Brown*, *supra*, 605-606, the Court has consistently indicated a willingness to accept a petitioner's assertion that the enforcement or adherence to a regulation is a burden upon the petitioner's religious belief without questioning the petitioner's interpretation of that religious belief. See, *e.g.*, *United States* v *Lee*, *supra*, 257; *Thomas* v *Review Bd of Indiana*, *supra*, 716. This approach is based on an aversion to the Court's formulation of a definition of religion, a most delicate endeavor which could pose a threat to religious pluralism.

Given the present posture of the Supreme Court, it is not difficult to embrace Chief Justice Burger's prediction. It is more likely, however, in our judgment, that rigid application of the compelling state interest standard articulated in the dissent to *Bowen* v *Roy* will result in an unfortunate dilution of the standard itself. See also Note, *The myth of religious neutrality*, 71 Va L R 127, 159 (1985).

22. *United States* v *Lee*, *supra*, 263 n 3; (Stevens, J., concurring). Justice Stevens further noted, "The principal exception is *Wisconsin* v *Yoder* in which the Court granted the Amish an exemption . . . by actually applying the subjective balancing approach it purports to apply today. . . . There is also tension between this standard and the reasoning in *Thomas* v *Review Board of Indiana*

of only one justice, we cannot ignore the conclusion that even the Supreme Court has acknowledged that certain government interests are so compelling that the state need not show that the means chosen is absolutely essential to further that interest, and that no lesser restrictive alternative could be subtituted. It thus appears that the degree of importance attached to the governmental interest can well dictate the extent the government is required to diminish the effectiveness of the regulation by granting an exemption.[23]

Those cases in which the state has failed in their burden are the exceptions, not the rule.[24] They have oc-

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Employment Security Div. and *Sherbert* v *Verner*. Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." (Citations omitted.)

23. "Once it is shown that the law burdens the practice of a religious belief the state must show that it has an overriding or compelling secular reason for refusing to grant an exemption from the regulation. In balancing the interest the court must first determine the degree of burden on the religious practice. Then, in assessing the state's interest, the court will have to determine the importance of the secular interest and the extent to which that interest would be impaired by an exemption for the religious practice. *If the state interest is truly compelling, there will be no requirement that the state diminish the effectiveness of its regulation by granting the exemption. However, if the state could achieve its goal as well by a means which would not burden the religious practice, it will be required to adopt the alternative means. If the state's interest is of a lesser magnitude it will be required to grant the exemption and accept a less effective means of fulfilling its goal.*" Nowak, Rotunda & Young, *supra*, 1054. (Emphasis added.)

24. The state was found to have met its burden in the following cases: *Goldman* v *Weinberger*, 475 US ____; 106 S Ct 1310; 89 L Ed 2d 478 (1986) (military regulations); *United States* v *Lee*, *supra* (social security laws); *Gillette* v *United States*, 401 US 437; 91 S Ct 828; 28 L Ed 2d 168 (1971) (selective service laws); *Braunfeld* v *Brown*, *supra*, (Sunday closing laws); *Prince* v *Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944) (child labor laws); *Reynolds* v *United States*, 98 US 17145; 25 L Ed 244 (1878) (polygamy law).

curred where the effect of a law on religious practices is severe and, as in *Yoder, supra,* where a lesser restrictive alternative has been clearly and convincingly established by the plaintiffs challenging the regulation,[25] or where the interest of the state in refusing to extend a legislative exemption has been found subordinate to the free exercise rights of those who were deprived by that interest and has suggested a discriminatory intent.[26] *Sherbert* v *Verner, supra; Thomas v. Review Bd. of Indiana Employment Security, supra.*

Those exceptions are clearly distinguishable from the case at bar.

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25. The opinion for reversal concludes from our observation of what occurred in *Yoder* that we would hold that the burden on plaintiffs in free exercise cases is to clearly and convincingly establish the existence of a lesser restrictive alternative to the challenged regulation. Slip op, p 46. we have never stated that this is the law. Rather, we have only taken note of the fact that the United States Supreme Court in *Yoder* explained in great detail why the Amish were entitled to an exemption from the compulsory education regulation in that case. In doing so, they found the fact that the Amish had "carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education" of particular significance. 406 US 235.

26. Concerning *Sherbert* and *Thomas*, Chief Justice Burger recently explained:

"The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Bowen* v *Roy*, n 1 *supra*, 106 S Ct 2156; see also *Sherbert, supra*, 401-402, n 4; *United States* v *Lee, supra*, 264, n 3 (Stevens, J., concurring) (*Sherbert* and *Thomas* may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect").

A

In *Wisconsin* v *Yoder, supra,* 215, the balancing test was based on "the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries." In that case the Amish persuasively established almost three hundred years of consistent practice which pervaded and regulated the respondents' entire mode of life. This evidence supported their claim that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise" of their religious beliefs. *Id.*, 219.

The *Yoder* Court accepted the proposition that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.*, 221. It also recognized that education prepares citizens to become self-reliant and self-sufficient participants in society.

The Court then found that the Amish had carried the burden of demonstrating the sufficiency of their alternative mode of continuing informal vocational education in the same terms of those interests advanced by the state in support of its compulsory high school education. *Id.* 235. It was then, the Court concluded, that in light of this convincing showing, and considering the minimal difference between what the state required and the Amish accepted, the state must show with more particularity how the admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. *Id.*, 235-236.

The most recent case applying the balancing test we believe appropriate where a paramount government interest is demonstrated is *Goldman* v *Weinberger, supra.*

In *Goldman*, a case decided this year, the petitioner contended that the Free Exercise Clause permitted him to wear a yarmulke while in uniform despite a United States Air Force regulation mandating uniform dress for Air Force personnel. The ultimate governmental interest at stake was congressional authority to raise and support armies and to regulate their performance. The intermediate goals or interests asserted were discipline, uniformity, the need to inculcate the virtue of obedience, and the subordination of the interests of the individual to the needs of the service. In order to achieve these objectives, the military promulgated dress regulations. Such regulations, as interpreted, prohibited the wearing of the yarmulke.

The petitioner asserted that his religious beliefs *required* him to wear the yarmulke and that, under *Sherbert* v *Verner*, *supra*, and *Wisconsin* v *Yoder*, *supra*, the regulation as applied to him burdened his free exercise of religion. A majority held that the governmental interest in the military is so important that any regulation which reasonably relates to achievement of any of the asserted intermediate interests was permissible even though the effect of the regulation was to cause a person to violate his religious beliefs.

Whereas the opinion for reversal in this case argues that it is inescapable that *Sherbert* v *Verner*, *supra*, sets the standard for all claims of violation of free exercise of religion, in *Goldman* only two justices agreed. Justices O'Connor and Marshall applied that standard and, in dissent, held that the granting of an exemption should be required. Justice Blackmun, in dissent, would have required an exemption as well, but he declined to apply *Sherbert* because the military was involved.

Seven of nine justices agreed that the granting of an exemption would create no danger of impairment of the military mission of the Air Force. Three justices, in a separate concurring opinion, noted that where a regulation is neutral regarding religion, is based on an objective

standard, is not motivated by hostility against, or any special respect for, any religious faith, to require an exemption simply because the governmental interest would not be impaired, thereby would invite nonuniform treatment for members of different religious faiths.[27]

The issue in the conflict between religiously motivated conduct and the military interest in uniformity of dress was resolved as it was because a majority recognized the paramount importance of the military interest. Although a majority of justices applied a rational basis test, a standard clearly not applicable here, *Goldman* nonetheless refutes any mechanistic and simplistic application of *Sherbert* to all free exercise claims. The point is that the congressional power to raise and regulate armies, including the requiring of uniform dress, is so important that the most important of personal rights, the free exercise of religion, even where directly burdened, must give way to the governmental regulation even where the relationship between the governmental interest and the means to achieve it is not only not essential or necessary, but the logical nexus is far from clear. *Goldman* suggests that the higher in rank the governmental interest, the less the need for necessity to support the means chosen to achieve it even where paramount personal rights are directly burdened.

B

The opinion for reversal sharply criticizes both the opinion of Chief Justice Williams and this opinion for articulation and application of the standard of review in

27. It may be argued that *Goldman*, based on the military interest, is sui generis. If that argument is sound, then five members of our nation's highest court have no fidelity to the constitution. The First Amendment makes no exception for the military. The military in this free society is not a separate branch of government. It is subordinate to the President and Congress. It acts under laws created by Congress. The First Amendment proscribes laws made by Congress which prohibit the free exercise of religion.

this case. Slip op, pp 39-51. In summary, the opinion for reversal states that the standard for review in free exercise claims is clear. Once the claimant has asserted that a governmental regulation burdens the free exercise of religion, the government is obligated to articulate and prove that it has a compelling interest, that the means selected to achieve that end is essential for that purpose, that no means less burdensome to free exercise exists to achieve such purpose, and that the granting of the exemption would effectively destroy the government's ability to achieve its purpose.

Our colleague implies, further, that the claim of religious practice as well as the burden thereon is defined by the claimant and that scrutiny of the claim is perhaps beyond the competence of the judiciary.

While the test used by Chief Justice Williams' opinion and in this opinion is articulated somewhat differently, we have applied the test articulated by the opinion for reversal in this case. Whether Supreme Court precedent requires this standard remains unclear. From the case law, however, the following factors do emerge as required considerations.

One obvious factor is the governmental interest. As *Yoder* and *Goldman* teach, questions regarding the importance of the interest are inescapable. As a practical matter, the level of abstraction employed by a court in recognizing the interest can often be controlling. The higher the level of generality, in general, the better the government will fare in the contest. The more concrete or fact-specific the interest recognized, the worse the government will fare in the balancing.

A second and third factor involve the means chosen by government to achieve its interest and the logical nexus between the end and the means. Evaluation of the latter relationship involves concepts such as necessity, essentiality, broadness versus narrowness, objective versus subjective, whether the regulation is one of general application, and whether the regulation is one of several

different ways to accomplish the objective or is the only way of doing so. In short, the stronger and more direct the logical nexus, the better the government will fare in the balancing.

A fourth factor is the private right asserted as affected. The rank given to such a right is also an inescapable consideration. Whether the right is explicit in the constitution, whether a court is asked to recognize such a right as a matter of first impression, or whether the right is claimed to exist by extension of, or analogy to, other explicit rights, some definition of the scope and nature of the right asserted is necessary. A fifth apparent factor is the nature of the conflict between the private right and the means chosen by the government to achieve its objective. Among other formulations of the concept employed here are direct versus indirect, belief versus conduct, purpose versus effect, and least restrictive alternative.

A sixth factor is the extent of the conflict. At this point in the analysis the amount of the burden or restraint is relevant, as well as to what extent the state's effectiveness in achieving its goal would be diminished if required to relieve the burden. A final factor is the role of the individual exemption. Whether it is required to be offered depends upon analysis of the above six factors.

If the governmental objective is compelling, if the means to achieve it are closely and narrowly drawn and if the effect on religious exercise is indirect, unintended, and marginal, then an exemption as an alternative to avoid the claimed conflict is not necessary.

In summary it appears that the higher the rank of the governmental interest, the stronger the logical nexus between such interest and the means selected to accomplish it, the less important the private right, the less direct the conflict between the exercise of the right and the regulation in question, and the lower the amount of the

burden, the less likely the claimant will win in the balancing process. A mathematically certain formula cannot be created which accounts for the internal evaluation of each factor and its relative weight with respect to each other factor. The essential judicial task is to evaluate asserted conflicts between private rights and public interests to insure that neither is compromised or destroyed.

III
ANALYSIS OF THE PLAINTIFFS' CLAIMS

Turning to the claims advanced by plaintiffs in the case at bar, we are unconvinced that compliance with the state teacher certification program will endanger or restrict the free exercise of their religious beliefs. The state's interest in education is paramount. The means selected to achieve that end, that is, a certification program to require that only academically qualified teachers are used to fulfill the mandatory educational requirements is narrowly drawn to accomplish that objective. The means selected is also neutral regarding religion, is based on an objective standard, and is not motivated by hostility against, or any special respect for, any religious faith. Moreover, insuring that teachers are academically qualified is an independent legitimate state interest.

The private right asserted is extremely important, but the nature and extent of the conflict are far less clear. On this record it does not appear that certification, as such, contravenes plaintiffs beliefs (as churches, pastors, teachers, or parents) except to the extent that some plaintiffs assert that any and all regulations of their church schools violate their religious beliefs.

Indeed, plaintiffs' free exercise claim is that certification itself is not opposed, but the government compulsion to attain it.[28] While plaintiffs object, on a religious

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28. In their reply brief, plaintiffs stated their central contention of injury: "[T]he Churches' point is not that a certified teacher may

basis to a course of study that teaches humanistic values, this objection is directed not to certification but to the institutions through which it is obtained. Pastor Ouellette testified that it is his belief that God has determined the criteria for the teaching ministry and that because there are very few people of plaintiffs' beliefs who have a teaching certificate, the certification requirement would make it very difficult and very burdensome to provide teachers for their schools.

Neither pastor testified to a religious objection to hiring certified teachers or that the requirement would force closure of their schools, and the record establishes that it is possible to become qualified for a state teaching certificate through a number of ways in harmony with plaintiffs' beliefs. It thus appears that the certification requirement alone neither compels plaintiffs to refrain from religiously motivated conduct or to engage in conduct they find objectionable. Certification, qua certification, does not contravene either the pastors' or the teachers' religious beliefs.

The only alternative for teacher certification offered in these proceedings is student testing. But, as the majority aptly points out, this testing comes too late.[29] The teacher certification requirements are essentially prophylactic in nature. Certification does not guarantee that a person will be an effective teacher, but it increases the probability that a teacher will be competent. Therefore, the certification requirements help prevent children from being exposed to unqualified teachers. Testing can

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not teach in the Churches' schools, it is that restricting the freedom of churches to engaging *only* government-certified teachers in its school ministry is abhorrent to their Scriptural beliefs."

29. We also agree with Chief Justice Williams that testing could result in the schools "teaching to the test," thus allowing more intrusion by the state into the functioning of private schools. See slip op pp 16-17.

at best only identify problems that require remedies. Testing, therefore, does not fulfill the prophylactic goal of the state's requirement.

There was also testimony offered by plaintiffs that the free market will naturally operate to eliminate inadequate schools. But plaintiffs offered no testimony that the children who attend such inadequate schools prior to their identification and elimination will not be harmed.

We further note that the plaintiffs' pastors and plaintiffs' own expert agreed that academic qualifications are desirable in the teaching profession. Plaintiffs' expert also listed other factors he considered important in a good teacher such as talent, dedication, and ethical convictions. But these characteristics are not susceptible to the type of government regulation involved here. As a preventive measure assuring at least a minimal competency, academic qualifications for teachers are the only requirements a government can objectively establish.

Unlike the Amish in *Yoder,* the departure from the requirements of the state here are not minimal. Carried forward, the logic of the position advanced by plaintiffs would require the state to give up any attempt to advance its interest in fostering education whenever persons opt for religious education as a matter of religious conviction. Such a result could effect a substantial deregulation of the teaching profession in the private sector, a profession critical to the proper and necessary education of our citizens.[30] The record here does not establish the long history of the Amish indicating the competence of their alternative method for selecting qualified teachers so as to ensure that the government interest in educating the citizenry is not endangered. Moreover, the children involved here will not return to an isolated agrarian community, but will be assimilated into modern society as a whole, a factor requiring closer scrutiny of plaintiffs' claims.

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30. See also n 33.

The plaintiffs in the case at bar have not established a case as strong and assuring as that established by the Amish in *Yoder*. For that reason, we do not find it necessary to require the state in this case to show with more particularity how its compelling interest in compulsory education will be adversely affected by granting an exemption to plaintiffs.[31]

The teacher certification requirements represent, at once, a compelling state interest of their own right and a state regulation narrowly drawn to achieve the broader goal of quality education. They constitute, at most, an indirect and minimal burden on the free exercise of religion by plaintiff.

IV
SUMMARY

In *Sherbert* v *Verner, supra*, and *Thomas* v *Review Bd, supra*, the Court reaffirmed a thirty-nine-year-old principle: A state may not exclude "Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

31. The opinion for reversal finds "curious" our analysis of the free exercise claim in this case. Slip op p 65, n 34. The reason for this, in our estimation, is that, while asserting that the burden on plaintiffs' free exercise of religion is both apparent and substantial, the opinion for reversal appears to actually proceed from the premise that *any* interference with a sincere religious belief or practice triggers the compelling state interest analysis. The opinion is well-written and aggressively presented. It may even be a sound prognostication of the outcome in the United States Supreme Court if and when that Court confronts the issue. It is, however, simply a prognostication. We have written to describe the analysis of that precedent which we conclude is required in the instant case. As the legion of scholarly comment on the Free Exercise Clause illustrates, if there is one thing that is clear in the history of the United States Supreme Court cases on free exercise issues, it is that very little is clear.

Everson v *Bd of Ed*, 330 US 1, 16; 67 S Ct 504; 91 L Ed 711 (1947) (emphasis deleted). In those cases, the states were unable to demonstrate a sufficiently compelling governmental interest. See *Thomas, supra,* 719 and *Sherbert, supra,* 406-409. Thus, the question whether the states' interests could be served through less burdensome means was not reached.

In the case at bar, "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Wisconsin* v *Yoder, supra,* 213. This paramount responsibility has been made to yield to the right of parents with respect to the religious upbringing of their childen only when the parents have assured an equivalent education in a privately operated system. *Wisconsin* v *Yoder, supra; Pierce* v *Society of Sisters, supra.*

This court must not lose sight of the fact that our courts "are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discreet aspects of a State's program of compulsory education."[32] *Wis-*

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32. The opinion for reversal takes judicial notice of the fact that the majority of states do not currently impose certification requirements upon teachers at nonpublic schools; that where they have been imposed, the trend is to grant exemptions for religious schools; and that the Michigan Legislature is currently considering altering this state's teacher certification program. Slip op pp 35-36, ns 58, 59, 60. We question the relevancy of this information. The issue before us is whether an exemption to the certification requirements is constitutionally mandated, not how the Legislature should develop its education program. We further note that the legislation pending in Michigan to which my colleague refers contemplates making certification more difficult to attain, thereby improving the quality of teachers. The fact that such legislation is pending does not support the conclusion that certification requirements are unnecessary to further the states' interest in maintaining quality education for all. Indeed, the opposite conclusion may be drawn, i.e., the state views its interest as so vital that the requirements should be retained and improved upon, not abandoned.

consin v *Yoder, supra,* 235. As the United States Supreme Court has cautioned, "[t]his should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemptions from generally applicable educational requirements." *Id.*, 235.

In the case sub judice, an alternative means by which the state can ensure that academically qualified teachers will further its interest in providing education to its citizenry has not been established. Although certification is not a guarantee of teacher competence, logic and experience indicate that it furthers that goal. The lack of statistics bearing out this corollary is not due to the fact that the corollary does not exist, but rather is because it is impossible to isolate the effect of certification when so many other variables, such as the talent and dedication of the teacher, the support of the family, and available resources and environment, are incapable of control. We are not unmindful of the current controversy regarding the effectiveness of the certification program in producing the quality of teachers every parent would have teach their child. But we are here to scrutinize the constitutional limitations of the Legislature, not its wisdom. Cf. *Braunfeld* v *Brown, supra,* 608.[33]

We would conclude that the certification requirement in the case at bar is an indirect and minimal burden on plaintiffs' free exercise rights and that the interest of the state is of such a high order as to override the interest claiming protection.

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33. Were we to require the state to offer the exemption requested in this case, it is quite possible that the requested exemptions would result in substantial deregulation of the teaching profession in the private sector, so that the state would be severely hampered in the support of its interest. Testimony at trial indicated that of the 30,000 parochial schools in this country, 12,000 are of plaintiffs' fundamentalist faith and 1,200 new schools are begun each year.

V
THE REMAINING ISSUES

We also agree with the treatment of the remaining issues in the opinion for affirmance. We note that the parties have reached an agreement as to the meaning of the other regulatory statutes involved. Because there is no longer a disagreement among the parties as to these points, see *Detroit* v *Street Electric Ry & Motor Coach Employees Union*, 332 Mich 237, 258; 51 NW2d 228 (1952), app dis 344 US 805 (1952); reh den 344 US 882 (1952),[34] further disposition of these issues by this Court

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34. The cases cited by the opinion for reversal for the proposition that issues on appeal do not become moot because an appellee concedes that error occurred in the court below are inapposite to the case at bar. In *United States* v *W T Grant Co*, 345 US 629; 73 S Ct 894; 97 L Ed 1303 (1953), at issue was the legality of certain conduct alleged to be in violation of the Clayton Act. This issue did not become moot when the defendant voluntarily ceased the conduct because the public interest in having the legality of such practices settled militated against a mootness conclusion. Nor did the discontinuance of the illegal conduct preclude the court's power to grant injunctive relief. The moving party, however, was required to satisfy the court that relief was necessary by establishing cognizable danger of recurrent violation.

In *Young* v *United States*, 315 US 257; 62 S Ct 510; 86 L Ed 832 (1942), at issue was conduct alleged to be in violation of the Harrison Anti-Narcotic Act, as amended. In the appeal from defendant's conviction, the government confessed error. The government's confession of error in that case, although entitled to great weight, did not preclude independent examination of the question by the Court. "The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding . . . . [T]he proper administration of the criminal law cannot be left merely to the stipulation of parties." 315 US 259.

Unlike the cases above, this case does not involve the meaning or application of a criminal or quasi-criminal statute which by nature, is generally subject to strict construction and cannot be sustained unless its mandates are so clearly expressed that an ordinary person can determine in advance whether his conduct is or is not punishable under the statute. See *People* v *Silver*, 302 Mich 359; 4 NW2d 687 (1942). At issue in this case is the meaning of certain

regulatory statutes and the interpretation of the statutes by the governmental agency charged with the responsibility of enforcing them. At this point, the plaintiffs have no quarrel with the state's interpretation of the statute, and there is no indication that the state intends to enforce the regulations according to any other interpretation. Because the conflict between the parties as to these issues is now resolved, we would be reluctant to create unnecessary precedent which could diminish the current flexibility in this area of the law.

It is a long-standing principle of jurisprudence that a court should avoid ruling on constitutional challenges to the legality of state statutes where such avoidance is possible. "[T]he Court will not pass upon the constitutionality of legislation . . . until it is necessary to do so to preserve the rights of the parties," *Coffman* v *Breeze Corps, Inc.*, 323 US 316, 324-325; 65 S Ct 298; 89 L Ed 264 (1945). Where the parties have reached agreement that their interests are satisfied without the need to resolve a constitutional claim, it is generally unwise for a court to disregard such agreement.

The opinion for reversal criticizes that approach and comments that it leaves standing the decision of the Court of Appeals on those issues. Our colleague would adopt as a controlling construction of the fifteen statutes the agreement of the parties. In the place of avoidance of rulings on constitutional claims, our colleague would thus delegate to the parties the authority to construe acts of the Legislature. Whatever merit there may be to the argument that this Court should rule upon the constitutionality of the curricula, licensing, and reporting requirements of the statutes involved despite the agreement of the parties, in our judgment, there is no merit to the position that the claim of the parties ought to be adopted relative to the constitutionality of statutes, thereby delegating to the parties the authority not only to reverse a decision of the Court of Appeals, but to construe acts of the Legislature and to effectively bind nonparties without the benefit of advocacy.

We intimate no opinion whether the Court of Appeals is correct or incorrect in the resolution of these issues. We intimate no opinion whether the Department of Education, here represented by the Attorney General, reached an appropriate agreement with the plaintiffs on these issues.

The interests of the plaintiffs are obviously furthered by such resolution since the State of Michigan is bound by its agreement. Whether the interests of the State of Michigan or its Department of Education are furthered, and whether the state is bound to treat all similarly situated citizens in accord with such agreement, we decline to decide.

is inappropriate.[35] See *Flint* v *Consumers Power Co*, 290 Mich 305; 287 NW 475 (1939).

We would affirm the decision of the Court of Appeals.

/s/ Patricia J. Boyle
/s/ James H. Brickley

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35. The parties would dispose of the curriculum issue on the basis of this Court's decision in *Snyder* v *Charlotte Public School Dist*, 421 Mich 517, 539-540; 365 NW2d 151 (1984). While we express no opinion on the merits of the parties' agreement, we would point out that a majority of this Court stated in *Durant* v *State Bd of Ed*, 424 Mich 364; 381 NW2d 662 (1985), that *Snyder* did not establish that public and parochial schools are required by law to provide a core curriculum. Rather, "*Snyder* stands for the proposition that *if a district chooses to offer certain courses, it must make them available to all students in the district*." *Id.*, 388. (Emphasis supplied.)

STATE OF MICHIGAN
SUPREME COURT
Filed November 24, 1986

SHERIDAN ROAD BAPTIST CHURCH,
FIRST BAPTIST CHURCH BRIDGEPORT,
REVEREND GERALD SOMERO,
REVEREND RENE B. OUELLETTE,
WILLIAM L. SWAIN and SHARON SWAIN,
his wife, RONALD MUNSON and JANICE MUNSON,
his wife, and MRS. SUSANNE KWAITKOWSKI,

Plaintiffs-Appellants,

v No. 73665

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION,
and PHILLIP E. RUNKEL, Superintendent
of Public Instruction,

Defendants-Appellees.

BEFORE THE ENTIRE BENCH (except Archer, *J.*).

RILEY, *J.*

This case involves the appropriate construction, constitutional validity, and enforceability of the private and parochial schools act, 1921 PA 302, MCL 388.551 *et seq.*; MSA 15.1921 *et seq.*, through the compulsory public education statute, MCL 380.1561 *et seq.*; MSA 15.41561 *et seq.* Plaintiffs successfully challenged the enforcement of several of the act's provisions on vagueness, free exercise, Establishment Clause, and substantive due process grounds. The Court of Appeals reversed the trial court's decision and upheld each provision of the act as applied. In deciding the vagueness and Establishment Clause challenges, both courts were required to construe some of the act's broadly expressed provisions.

A number of issues in this case which were constitutionally adjudicated may now be resolved on

nonconstitutional grounds by expressly adopting limiting constructions for several of the act's broadly expressed regulatory provisions.[1] The remaining question concerns the constitutionality of closing down two independent fundamentalist Christian schools, and compelling the children attending those schools to attend the public schools or a nonpublic school against the wishes of their parents, not on the ground that the schools are failing to adequately "educate" these children (and thereby defeating the legitimate public interests underlying the compulsory public education law), but because of each school's religiously based refusal to comply with the statutory teacher certification requirement, which requires *all* denominational and parochial schools to employ *only* teachers who hold a certificate such as would qualify them to teach in the public schools.[2]

The record abundantly supports the trial court's findings that plaintiffs' refusal to comply with the certification requirement is based upon sincerely held religious beliefs and that the certification requirement affirmatively interferes with the free exercise of those beliefs. Thus, plaintiffs' religious practice with regard to the employment of teachers is protected by the First Amendment, and the statutory regulation, as applied, is constitutionally suspect. The crucial question, therefore, concerns whether the state has established that enforcing the certification requirement is essential to the fulfillment of a compelling governmental interest—here, the objectives of the compulsory education law. In this

1. I am persuaded that my colleagues have failed to adequately address these issues by inappropriately dismissing them.

2. MCL 388.553; MSA 15.1923. See 1979 AC, R 390.1101 *et seq.*; 1981 AACS, R 390.1101 *et seq.* (the Teacher Certification Code). The state conceded at the outset of trial that plaintiffs' children were in no way receiving an "inadequate" education. See n. 53. The state has not asserted that plaintiffs' teachers are incompetent, academically or otherwise, but only that they have not all complied with the administrative requirements to obtain the requisite certificates to teach in the public schools.

regard, it was incumbent upon the state to show, first, that exempting plaintiffs from the certification requirement would unduly impair its interest in compulsory education and, second, that enforcing the certification requirement is the least intrusive means (upon plaintiffs' free exercise rights) by which to accomplish its objective.

The state has never asserted, in this case, that exempting plaintiffs from the state teacher certification regulation will detract in any way from its interest in furthering the objectives of compulsory education. Furthermore, it conceded that plaintiffs were in no way failing to adequately educate their children, even though they were not employing only teachers who held certificates to teach in the public schools. See n 53. Plaintiffs, on the other hand, although not required to do so, have presented persuasive empirical evidence that an exemption would not harm the state's interest. In this regard, the record contains the documented academic achievement records of the chidren, objectively measured by their performance on standardized achievement tests. Additionally, it reflects the existence of numerous empirical studies, through the testimony of nationally recognized education experts, conducted in the overwhelming majority of states which do not impose the regulation that all children be educated only by state certified teachers to implement their complusory education laws (no more than five other states currently impose such a regulation),[3] which support the factual conclusion that religious schools that do not employ only state certified teachers pose no threat to the state's interest in education. It is uncontested, on the record in this case, that no correlative relationship in fact exists, in religious

3. Those states are: Hawaii, Idaho, South Dakota, Washington and Iowa. See n 58. At the time of this writing, the Iowa Legislature, upon the recommendation of a special Governor's task force report, is considering abrogating that state's certification requirement. See n 59.

schools, between state teacher certification and student learning or teacher competence.

My colleagues, per the opinion of Chief Justice Williams, would uphold the enforceability of the legislation as applied, as did the Court of Appeals, by finding that it is *reasonably related* to furthering the state's interest in education.[4] Justice Boyle, concurring in that result, applies her version of the "balancing test" appropriate in this case, of which the ultimate characteristic is to relieve the state of its burden to justify the enforcement of legislation which affirmatively interferes with fundamental First and Fourteenth Amendment rights.[5] Jus-

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4. In reaching its decision in this case, reversing the trial court's ruling, the Court of Appeals also applied that standard of review. The Court of Appeals reasoned:

> "Plaintiffs have urged that there is no compelling state interest in any of the specific state requirements involved in this case but this argument misplaces the emphasis. The issue is not whether there is a compelling state interest in any individual regulation but whether the individual regulations are *reasonable means to give effect to a broader compelling state interest* — in this case the provision of an education to all children, for the reasons stated herein, we believe the regulations are a *reasonable* exercise of state authority in the field of education." (Emphasis added.) *Sheridan Church* v *Dep't of Ed*, 132 Mich App 1, 22; 348 NW2d 263 (1984).

5. I disagree with Justice Boyle's assertion that the United States Supreme Court has not addressed the burden of proof imposed upon the state in order to justify the enforcement of legislation which infringes upon individuals' rights afforded by the Free Exercise Clause. See slip opinion, p 6, and n 11. The Supreme Court's decisions construing the Free Exercise Clause, including *Wisconsin* v *Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972), have consistently held that it is the state's burden of proof in this regard to establish that granting the appropriate remedy, exemption, will unduly interfere with the fulfillment of a compelling governmental interest. Indeed, Justice Boyle's opinion acknowledges that " '[t]he government must show that granting the requested exemption will do substantial harm to th[e] [state's] interest. . . .' " (Citation omitted.) Slip opinion, p 3.

Justice Boyle's opinion for affirmance, like Chief Justice Williams' opinion, does not impose that burden of proof upon the

tice Boyle would uphold the challenged legislation, as applied, because "logic and experience indicate that it furthers [the state's interest in education]," essentially applying, as did the Court of Appeals and Chief Justice Williams, a rational-basis standard of review. I am convinced that my colleagues, with all respect, have not applied the constitutionally mandated standard of review, that they have substantially ignored the factual record, and that they have inappropriately disposed of several of the other constitutional questions presented with regard to the private and parochial schools act.

The record in this case does not support the factual conclusion that enforcing the teacher certification provision of the act, as applied, is essential to the state's interest in compulsory education. Indeed, the state, upon which the burden to justify enforcing that legislation unquestionably rests, has failed to establish any substantial relationship between the enforcement of that regulation and the governmental interest in compulsory education. Unless, and until, the state can show otherwise, I would reverse the decision of the Court of Appeals and reinstate the decision of the trial court enjoining the enforcement of that statute as applied. Furthermore, I would expressly adopt limiting constructions for several of the act's other provisions and uphold their constitutional validity as construed, and I would reverse the decision of

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state in this case. Her opinion does not conclude, either by reference to the extensive record or otherwise, that exempting plaintiffs from the certification requirement will result in any harm whatsoever to the state's interest in compulsory education. Instead, Justice Boyle's opinion concludes that plaintiffs have not established "an alternative means by which the state can ensure . . . its interest in providing education to its citizenry. . . ." Slip opinion, p 25.

I am persuaded that Justice Boyle's opinion effectively shifts the state's burden to justify the enforcement of the regulation challenged in the present case upon the plaintiffs to justify its nonenforcement. I am equally persuaded that her opinion's reference to *Yoder*, *supra*, to support that approach, is entirely misplaced. See Part VI, B.

the Court of Appeals to the extent that it is inconsistent with those constructions.

I

An understanding of the constructional and constitutional issues involved in this case requires a brief discussion of the operative provisions of the private and parochial schools act of 1921.

Section 1 of the act, after vesting supervision of "all the private, *denominational* and *parochial* schools of this state" to the Superintendent of Public Instruction, declares:

> "It is the intent of this act that . . . the courses of study [in such schools], and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state."

Section 2 of the act defines "private, denominational or parochial school," within the meaning of the act, as "any school other than a public school giving instruction to children below the age of 16 years, in the *first* 8 grades as provided for the public schools of the state." (Emphasis added.)

Section 3 of the act expressly imposes the teacher certification requirement:

> "No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state."

Section 4 of the act authorizes the Superintendent of Public Instructions to enforce the provisions of the act and sets forth enforcement procedures. If a violation of the act is established, after an administrative hearing, the Superintendent of Public Instruction is to "order

[compliance] with the requirements of th[e] act found to have been violated . . . ." If such an order is not obeyed within sixty days, the "superintendent . . . may close [the] school and prohibit . . . [the] operating or maintaining [of the] school . . . until [the] order . . . has been complied with." The children attending a school which has refused to comply with the requirements of the act

> "shall be compelled to attend the public schools or approved [nonpublic] school under the provisions of the compulsory education act . . . of 1905, as amended. And it shall be the duty of the persons having charge of the enforcement of the said compulsory education act . . . to compel the attendance of the children . . . at the public schools or approved private, denominational or parochial school."[6]

Finally, § 5 of the act authorizes the Superintendent of Public Instruction "by himself, his assistants, or any duly authorized agent," to "at any time . . . investigate and examine into the conditions of any school operating under this act," and imposes a duty upon such schools to "submit for examination its sanitary condition, the records of enrollment of pupils, *its courses of studies as set forth in section 1 . . . and the qualifications of its teachers*." (Emphasis added.) Any refusal to comply with the provisions of § 5 "shall be considered sufficient cause to suspend the operation of [the] school . . . ."

II

Plaintiffs, Sheridan Road Baptist Church, First Baptist Church Bridgeport, their pastors, parents of children enrolled in the churches' schools, and members of the faculties, commenced this action in the Ingham Circuit

6. The compulsory education act of 1905, has survived relatively unchanged and is currently incorporated in part 24 of the School Code. MCL 380.1561-380.1599; MSA 15.41561-15.41599.

Court after the Department of Education and the Superintendent of Public Instruction sought suspension of the operation of the schools operated by each church for failure to comply with the reporting requirements of the act.[7]

Plaintiffs sought injunctive and declaratory relief, challenging the constitutional validity and application of several of the act's provisions, and regulations promulgated thereunder, as violative of the Free Exercise and Establishment Clauses of the First Amendment, the Ninth Amendment, the Due Process Clause of the Fourteenth Amendment,[8] and art 1, § 4, and art 8, § 1, of the Michigan Constitution. Plaintiffs' constitutionally challenged provisions of the act which attempt to impose curriculum requirements, licensing (or "approval") requirements, teacher certification requirements, and reporting requirements, as applied, to regulate the existence and operation of plaintiffs' independent fundamentalist Christian schools.

The state counterclaimed, seeking an injunction to require plaintiffs to comply with the regulations, and a declaration that 1921 PA 302 is constitutional on its face and as applied to plaintiffs.

After a six-day trial, the court issued a memorandum decision in which, having considered all of the testimony, it made specific findings as to: the plaintiffs' religious beliefs, practices, and ministries; the nature of Michigan's interest in demanding certification of the teachers in church schools; the correlative relationship

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7. Sheridan Road Baptist Church operates the Sheridan Road Christian School; First Baptist Church Bridgeport operates the Bridgeport Baptist Academy. Procedures were instituted to suspend the operation of each school and to determine compliance with the provisions of the act. Plaintiffs' schools were the only schools against which such procedures were instituted.

8. Plaintiffs challenged provisions of the act as unconstitutionally vague and as violative of the "privacy" rights of parents to direct the academic, social, and religious education of their children.

between teacher certification, teacher "competence," and student learning; the vagueness of the curriculum requirement and its inability, as construed, to ensure uniform "quality" in education; and the inappropriateness of vesting authority over religious school curricula in local public school officials operating without standards or guidelines.[9]

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9. The trial court found that, as currently implemented, § 1 of the act requires the curricula of nonpublic schools to be "comparable" to public schools in *the same district*, and that local school district officials are charged with evaluating nonpublic schools. The court found, further, that guidelines for local school district officials in evaluating nonpublic schools do not exist.

The Superintendent of the Bridgeport Spalding Community School District, within which plaintiffs' schools are located, testified that it was within his power to determine whether a nonpublic school was "comparable" and that in his opinion nonpublic schools must teach "appropriate" courses of the same quality as those taught in the public schools within the district.

The superintendent also admitted concern with the loss of $2,000 in state aid for every student who leaves the public school and enrolls in area nonpublic schools when plaintiffs introduced a newsletter entitled *The Spotlight* which is sent to "key communicators in the school district" by the superintendent. The superintendent read the following excerpts from that publication into evidence:

> "At the present time, we in the school district have established some basic principles we hope will assist us in getting by during this economic depression.
>
> * * *
>
> "Number 4, to prevent loss of students to nonpublic schools. . . . We lose $2,000 for every student who leaves our school district." (Joint Appendix, 227a.)

The trial court found that local school district officials are ill-prepared to implement the broad provisions of the act and the corresponding provisions of the compulsory attendance statute without guidelines, and expressed concern that they have a vested interest in maintaining enrollment in the public schools. Circuit court opinion, part V, issued December 29, 1982.

The trial court upheld plaintiffs' constitutional challenges and enjoined application and enforcement of the curricula and teacher certification requirements as applied to plaintiffs.[10]

The state filed a claim of appeal, and the Court of Appeals reversed, upholding the constitutionality of 1921 PA 302, as applied, because it found that the infringement of plaintiffs' free exercise rights was justified by each challenged regulation's *reasonable* relationship to the state's interest in education.[11]

This Court granted plaintiffs' application for leave to appeal to consider the constitutional enforceability of the private and parochial schools act, as applied to plaintiffs, with respect to each of plaintiffs' constitutional challenges, and to review the Court of Appeals decision which reversed the decision of the trial court with regard to each challenge. 422 Mich 857 (1985).

III

It now appears that a number of the constitutional issues which were adjudicated by the Court of Appeals and the trial court may be resolved on nonconstitutional grounds if this Court adopts a limited construction of the statutory curricula and licensing ("approval") requirements.[12]

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10. The trial court held § 1 of the act, which requires courses of study to be of "the same standard as provided by the general school laws in the state," to be unconstitutional as applied to plaintiffs; § 3 of the act, which requires teachers employed in religious schools, without exceptions, to hold a Michigan teacher's certificate, to be unconstitutional as applied to plaintiffs; and that the information gained from plaintiffs pursuant to § 5 of the act may not be used for purposes of approval of plaintiffs' schools.

11. *Sheridan Church, supra*, 22.

12. My colleagues have inappropriately treated plaintiffs' position in this regard as a dismissal of their appeal from the Court of Appeals decision.

The state has advanced a limited construction of the provisions imposing curricula and licensing requirements upon *all* nonpublic schools, which, apparently, it did not advocate in the Court of Appeals or in the trial court.[13] Plaintiffs, responding to these proposals, have stated that adopting this limiting construction would remove plaintiffs' constitutional objections to those two aspects of the state's regulatory scheme. Likewise, plaintiffs would no longer object to the reporting requirement as it relates to those aspects of the scheme.

Thus, if this Court adopts the limited construction now advanced with respect to the statutory curriculum, licensing, and reporting requirements, the only remaining question requiring constitutional adjudication concerns the plaintiffs' challenges to the teacher certification requirement. I would adopt those limiting constructions to avoid constitutional adjudication with regard to those statutory requirements. A statute "ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v *Catholic Bishop of Chicago*, 440 US 490, 500; 99 S Ct 1313; 59 L Ed 2d 533 (1979).[14]

The intent of the private and parochial schools act to directly regulate religious schools is clearly expressed.[15]

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13. The limiting constructions now advanced by the state conflict with the constructions given to those provisions' by both the Court of Appeals and the trial court.

14. See *Ashwander* v *Tennessee Valley Authority*, 297 US 288, 348; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring); *Snyder* v *Charlotte Public School Dist*, 421 Mich 517; 365 NW2d 151 (1984). But cf. *Heckler* v *Mathews*, 465 US 728, 741; 104 S Ct 1387; 79 L Ed 2d 646 (1984) (seeking alternative construction does not "license a court to usurp the policymaking and legislative functions").

15. The act expressly refers to "denominational and parochial schools." Additionally, it should be emphasized that the overwhelming majority of nonpublic schools are in fact religiously affiliated. It has recently been noted, for example, that "[i]n the 1980-81 school

While the reasonable regulation of all nonpublic schools is permissible within the state's police power, such regulation is not beyond the limitations of the Bill of Rights. Set against the governing principles of neutrality and accommodation inherent in the First Amendment's protection of religious freedom, the facts of the present case give rise to serious constitutional questions concerning the extent to which the government may regulate "nonpublic" education, without consideration for religious exemptions and the individual freedoms of parents and their children. With regard to plaintiffs' free exercise claims, the constitutionally recognized right of parents to direct the religious and intellectual education of their children is directly implicated. See *Wisconsin* v *Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972); *Pierce* v *Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925). See also *Project, education and the law: State interests and individual rights*, 74 Mich L R 1373 (1976). Furthermore, the intrusive nature of the enforcement provisions of the act, §§ 4 and 5, elevates the need for careful consideration of plaintiffs' free exercise and due process challenges.

Additionally, the act's broadly expressed continuous regulatory authority may give rise to serious constitutional questions under the Establishment Clause. See *Lemon* v *Kurtzman*, 403 US 602, 616; 91 S Ct 2105; 29 L Ed 2d 745 (1971).

Nevertheless, I am persuaded that a limited construction may be given to the curricula, licensing, and reporting requirements, which, within the facts of the present case, would be consistent with the First and

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NOTES (*Continued*)

year, 84% of private schoolchildren (including those in kindergarten) attended church-affiliated schools." Note, *Tuition tax deductions and credits in light of Mueller v Allen*, 31 Wayne L R 157, n 3 (1984) (citing National Center For Education Statistics, US Dep't of Education, Digest of Education Statistics, 49 (1982).

Fourteenth Amendments, and would make it unnecessary to apply the constitutionally mandated heightened standard of review to determine the enforceability of those statutory provisions.

A

The act does not define curricula requirements per se, other than its reference in the general intent sentence of § 1 that "the courses of study . . . shall be of the same standard as provided by the general school laws of the state." In addition to the inherent vagueness of "the same standard," the numerous constructions that could be given to the phrase "provided by the general school laws of the state" renders the act's attempt to impose "required" courses of study cryptic.[16]

Plaintiffs' attempt to ascertain the meaning of the "curriculum requirement," to which it must comply, was of no avail at trial; the examination of state officials and the production of documentary evidence resulted in contradictory and confusing evidence.[17] The trial court ul-

16. At least three possible constructions could be given to the phrase "provided by the general school laws of the state": courses mandated in the general school laws expressly for nonpublic schools, which would include only Civics and Government (MCL 380.1166; MSA 15.41166); courses provided for in the general school laws not expressly limited to public schools, which would include sex education (MCL 380.1501; MSA 15.41501), reproductive health (MCL 380.1506; MSA 15.41506), and other courses that plaintiffs object to on religious grounds; the reference to courses of study in the compulsory education statute (MCL 380.1561; MSA 15.41561), which is not directly applicable to schools, but is a truancy law enforceable against parents, and requires courses "comparable" to those offered in the public schools of the particular school district in which the nonpublic school is located.

17. For example, a consultant from the Department of Education testified that it means the same "courses," but that "there are questions concerning the meaning of the act." (Joint Appendix, 262a-263a.) The school superintendent testified that it means "quality," not "subjects." (Joint Appendix, 232a.) A Department of Education official testified that it means "basic core subjects," but

timately held this statutory requirement to be unconstitutional on its face.[18]

According to a Department of Education publication which was produced and admitted at trial, the curricula requirement imposed by § 1 of the act requires that the courses of study provided by nonpublic schools "*be the same or equivalent to* that provided by the public school district in which the said nonpublic school is located geographically." (Emphasis added)[19] That construction seems consistent with the compulsory education statutes' exception to mandatory *public* school attendance for:

> "(a) A child who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools . . . , as determined by the course of study for the public schools of the district within which the nonpublic school *is* located." MCL

NOTES *(Continued)*

that only two are required, "Government and civics," (Joint Appendix, 254a-255a.), but that any course that a consensus in Michigan deemed "basic" would have to be taught. The Associate Superintendent for Elementary and Secondary Education testified that it means only Civics and Government and that a nonpublic school need not teach mathematics. (Joint Appendix, 269a-270a.)

18. The trial court found § 1 of the act to be violative of the Establishment Clause, because it causes excessive government entanglement and, as construed, does not further the state's interest in education. The court's holding was premised, at least partially, upon the factual finding that local public school officials are charged with evaluating and enforcing the curricula requirements without guidelines. See n 9.

19. Department of Education publication, *Statutory Provisions for the Establishment and Operation of Elementary and Secondary Non-Public Schools*, p 12. (Joint Appendix, 529a.) That publication states, additionally, that "[s]pecific subject contents, as prescribed by the legislature in the General School Law, [must] be included in the basis [sic] course of study of the nonpublic school." (Joint Appendix, 545a.)

380.1561(3)(a); MSA 15.41561(3)(a).[20]

Citing this provision of the compulsory education statute, the Court of Appeals held that nonpublic schools, "'[i]n order to win state approval,' must offer "courses 'comparable' to those offered by the public schools in the district within which the nonpublic school is located." 132 Mich App 1, 25; 348 NW2d 263 (1984). As construed by the Court of Appeals, the curricula that a nonpublic school is statutorily required to adopt depends upon the geographical location of the school and would include courses other than "core curriculum courses" and courses religiously objectionable to plaintiffs.[21]

However, the state now rejects the Court of Appeals construction and asserts a more limited construction of the statutory curricula regulation, citing this Court's decision in *Snyder v Charlotte Public School Dist.*, 421

20. Other exceptions to mandatory public school attendance (MCL 380.1561[3][b]-[e]; MSA 15.41561[3][b]-[e]) are:

(b) a child who is employed as a page or messenger in the Legislature during the period of employment;

(c) a child under nine years old who does not reside within two and one-half miles of a public school;

(d) a child from the age of twelve to fourteen while in attendance at *Confirmation* classes;

(e) a child enrolled in the public schools attending *religious instruction* classes for not more than two class hours per week, upon written request of the parent.

21. Statutorily prescribed courses include: cirtical health problems education (MCL 388.382 *et seq.*; MSA 15.1958(2) *et seq.*); communicable diseases (MCL 380.1169; MSA 15.41169); physiology and hygiene (MCL 380.1170; MSA 15.41170); humane treatment of animals (MCL 380.1171; MSA 15.41171); instruction in the pluralistic, multiracial, and multiethnic nature of society (MCL 380.1173; MSA 15.41173); instruction in the culture of ethnic, religious and racial minorities, and the contributions of women (MCL 380.1174; MSA 15.41174); sex education (MCL 380.1501; MSA 15.41501); health and physical education (MCL 380.1502; MSA 15.41502); and reproductive health instruction (MCL 380.1506; MSA 15.41506).

Mich 517; 365 NW2d 151 (1984), in which this Court referred to the curricula requirement. This limited construction, which plaintiffs have stated would remove their constitutional objections,[22] would not depend upon geographical location and would require nonpublic schools to provide a " 'core curriculum'. . . such as basic reading, mathematics, writing, English, etc." *Id.*, 540.[23] Plaintiffs maintain an extensive "core curriculum" of required courses, and the state agrees that plaintiffs are not in violation of the curriculum requirement.[24]

Further, the state affirmatively asserts that the private and parochial schools act should not be construed as authorizing state officials to "inject themselves into the operation of nonpublic schools," or to "examine content of courses," or to engage in "monitoring" the churches' schools, or to "evaluate curriculum . . . , teaching techniques and methods, textbooks, or testing procedures."

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22. In addition to challenging the curricula requirements imposed by § 1 of the act as violative of the religious freedom guarantees of the First Amendment and parental privacy protections of the Fourteenth, plaintiffs challenge that statutory regulation as unconstitutionally vague. See *State* v *Newstrom*, 371 NW2d 525 (Minn, 1985). See also *Keyishian* v *Bd of Regents*, 385 US 589; 87 S Ct 675; 17 L Ed 2d 629 (1967).

Plaintiffs now agree, however, that should this Court "adopt the construction of the curriculum requirement now offered by the State (in the face of the 'comparability' requirement of 1976 PA 451, Section 1561), the vagueness challenge of plaintiffs is dispelled." Reply brief of plaintiffs-appellants, 4, n 1.

23. Additionally, pursuant to MCL 380.1166; MSA 15.41166, which is applicable to both public and nonpublic schools, "courses of instruction [are required] in the constitution of the United States, . . . constitution of Michigan, . . . government of the United States [including history thereof], Michigan, and its political subdivisions, [and] [a] high school . . . course . . . in civics . . . [stressing] the rights and responsibilities of citizens." MCL 380.1166(1), (2); MSA 15.41166(1), (2).

24. The state conceded at the outset of the trial in this case that plaintiffs are in compliance with the curricula regulations. See n 53.

Brief of defendants-appellees, pp. 24-25.[25]

B

With regard to the licensing/approval issue, the state now asserts that Michigan law "does not provide for or require the approval or licensing of any school"; it merely confers the authority to " 'disapprove' for noncompliance with specific requirements." The state urges that although 1921 PA 302, § 4, and the compulsory education statute[26] refer to " 'approved' nonpublic schools . . . this simply means a school which has not been 'disapproved,' " and, thus, no "prior restraint" is imposed to the beginning or continuing of plaintiffs' teaching ministry. Brief of defendants-appellees, pp. 10-11.

Plaintiffs agree that, if adopted, this construction would remove their constitutional objections to the "licensing" requirement which "has been of deepest concern [to them] since . . . they are religiously disabled to seek a governmental permit to initiate a ministry." Reply brief of plaintiffs-appellants, p. 5.

C

Adopting the proposed limited construction of the curricula and "approved" requirements would also remove plaintiffs' objection to the reporting requirements imposed under § 5 of the act as they relate to those aspects of the regulatory scheme. Plaintiffs have never objected to the reporting requirements imposed by § 1578 of the School Code, MCL 380.1578; MSA 15.41578,

25. As the trial court found, there are no significant guidelines restricting the supervisory authority granted to local public school district officials to evaluate local nonpublic schools. The local official charged with evaluating plaintiffs' schools testified that it was within his authority to evaluate textbooks and teaching techniques to determine "comparability." (Joint appendix, 238a.)

26. MCL 380.1561(3)(a); MSA 15.41561(3)(a). See text accompanying n 20.

which does not require information for purposes of enforcing regulations religiously objectionable to plaintiffs.[27]

D

I would expressly adopt the limited constructions of those provisions of the act and thereby reverse and modify the decision of the Court of Appeals to the extent that the constructions given to those provisions by the Court are inconsistent with the limited constructions here adopted. My colleagues' treatment, or, more precisely, nontreatement of these issues does not appropriately resolve the constitutional questions presented. Plaintiffs have not dismissed their constitutional challenges to the enforcement of those provisions, as construed in the binding decision of the Court of Appeals. That the state has modified its position with respect to the appropriate statutory construction of the requirements imposed upon all nonpublic schools and its authority to enforce those requirements, does not, in itself, remove plaintiffs' constitutional objections. Statutory construction is within the province of the courts, and the constructions now urged by the state, which conflict with the constructions adopted by the binding decision of the Court of Appeals, are without legal effect. Plaintiffs have not agreed to dismiss, by stipulation of the parties, the constitutional

27. Section 1578 requires nonpublic schools to report the following data, at the beginning of the school year:

"(a) the name and age of each child who is enrolled at the school.

"(b) The number or name of the school district and the city or township and county in which the parent, guardian, or person in parental relation resides.

"(c) The name and address of the parent, guardian, or other person in parental relation.

"(d) The name and age of each child enrolled in the school who is not in regular attendance." MCL 380.1578; MSA 15.41578.

questions presented with regard to those provisions. While stipulations as to questions of fact are binding upon the parties, stipulations concerning questions of law are inoperative, and without legal effect. See *People v Levisen*, 404 Ill 574; 90 NE2d 213 (1950).

The cases cited in Justice Boyle's opinion do not support my colleagues' avoidance of these issues. In *Detroit v Street Ry Employees Union*, 332 Mich 237, 258; 51 NW2d 228 (1952), the issue referred to "was not decided by the lower court." In *Flint v Consumers Power Co*, 290 Mich 305, 308; 287 NW 475 (1939), no actual controversy existed at the time the declaratory judgment action was instituted in that case.

This Court may not appropriately dispose of these issues by deciding that no "case or controversy" exists, or that the issues have been mooted. The case or controversy requirement of the federal constitution, which prohibits the federal courts from issuing advisory opinions, is completely inapplicable in this situation. An actual controversy does exist, with actual parties, and, indeed, it has been decided by both the trial court and the Court of Appeals. The inapplicability of the mootness doctrine is also apparent. Issues on appeal do not become moot, and therefore not reviewable, because the appellee changes its position and thereby concedes that the decision being reviewed was incorrect to that extent. See, e.g., *United States v W T Grant Co*, 345 US 629; 73 S Ct 894; 97 L Ed 1303 (1953); *Young v United States*, 315 US 257; 62 S Ct 510; 86 L Ed 832 (1942). The effect of my colleagues' nontreatment of these issues is to allow the Court of Appeals constructions of these provisions of the act to stand, effectively affirming them, and to ignore the substantial constitutional questions presented.

Justice Boyle articulates her disapproval of adopting the limiting constructions now advanced by the state to uphold the constitutional validity of these statutes and avoid reviewing the decision of the Court of Appeals,

stating that that position has "no merit whatsoever." Slip opinion, p 27, n 34. However, contrary to Justice Boyle's assertions, my point is that the appropriate resolution of these issues requires either (1) adopting limiting constructions of these statutes to uphold their constitutional validity and make it unnecessary to review the decision of the Court of Appeals, or (2) reviewing the substantial vagueness, Establishment Clause, free exercise, and other issues decided by the Court of Appeals as it construed these statutes. Because my colleagues are not inclined to adopt any limiting constructions of these statutes, I would suggest that the only other appropriate disposition would require reviewing the Court of Appeals decision, which is binding upon these parties and all others regardless of the so-called "agreement" of the parties, in its entirety.

The error in Justice Boyle's assertion that "the State of Michigan is bound by its [so-called] agreement" (slip opinion, p 26, n 27), is exemplified by her own inapposite criticism that I would "delegate to the parties the authority to construe acts of the Legislature," and "the authority . . . to reverse a decision of the Court of Appeals." *Id.*, p 27, n 34.

IV

The remaining constitutional question concerns the enforceability, consistent with the First and Fourteenth Amendments of the United States Constitution, of the teacher certification statute, MCL 388.553; MSA 15.1923, and regulations promulgated thereunder, 1979 AC, R 390.1101 *et seq.*; 1981 AACS, R 390.1101 *et seq.* (the Teacher Certification Code), as applied.

The state teacher certification requirement is imposed by § 3 of the 1921 act. It requires all parochial and denominational schools to employ *only* teachers who "hold a certificate such as would qualify him or her to

teach in . . . the public schools of the state." The administrative requirements for securing state certification are promulgated by the State Board of Education, and include the completion of a program of study at a state approved teacher training institution. Upon the recommendation of such an institution, a provisional certificate is issued. To obtain a continuing certificate, the candidate must complete eighteen semester hours of additional study, which is not restricted to any particular subject matter but which must be approved by the training institution. See generally 1979 AC, R 390.1101 *et seq.*; 1981 AACS, R 390.1101 *et seq.*, for additional specific regulations regarding teacher certification.

The enforcement provisions of the act, §§ 4 and 5, authorize the state to close any parochial or denominational school which is in violation of § 3 (i.e., does not employ *only* teachers who hold a valid state certificate).

Plaintiffs challenge the enforcement of the teacher certification statute as an unnecessary interference with their First Amendment rights to freely exercise their religion. Additionally, plaintiff parents assert their fundamental rights, as parents, to direct the intellectual and religious education of their children, and the rights of their children to receive that direction without unnecessary interference by the state. This "fundamental right" has been recognized independent of the First Amendment, as protected under the "personal" substantive due process rights inherent in the liberty protections of the Fourteenth Amendment. See *Pierce, supra; Prince* v *Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944); *Farrington* v *Tokushige*, 273 US 284; 47 S Ct 406; 71 L Ed 646 (1927); *Meyer* v *Nebraska*, 262 US 390; 43 S Ct 625; 67 L Ed 1042 (1923). See also *Project, education and the law: State interests and individual rights, supra*. The fundamental liberty right recognized in the those cases has been reaffirmed by the Supreme Court, moreover, in several recent decisions in which it has cited those earlier decisions with approval. See

Yoder, supra, 233. See also *Moore* v *East Cleveland*, 431 US 494; 97 S Ct 1932; 52 L Ed 2d 531 (1977); *Runyon* v *McCrary*, 427 US 160, 178, n 15; 96 S Ct 2586; 49 L Ed 2d 415 (1976); *Roe* v *Wade*, 410 US 113, 152-153; 93 S Ct 705; 35 L Ed 2d 147 (1973).[28]

In *Pierce, supra*, the Court held unconstitutional an Oregon compulsory education act which required public school attendance with limited exceptions not including private school attendance.[29] The Court said:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers *only*. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (Emphasis added.) *Id.*, 535.[30]

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28. See also *Norwood* v *Harrison*, 413 US 455, 461; 93 S Ct 2804; 37 L Ed 2d 723 (1973) ("a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice"); *Committee for Public Ed & Religious Liberty* v *Nyquist*, 413 US 756, 788; 93 S Ct 2955; 37 L Ed 2d 948 (1973) ("a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause").

29. The Oregon Compulsory Education Act, adopted in 1922, provided exemptions "for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent." *Pierce, supra*, 530-531.

30. Pierce was decided before the religious freedom guarantees of the First Amendment were held applicable to the states through the Fourteenth Amendment in *Cantwell* v *Connecticut*, 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940), and *Everson* v *Bd of Ed*, 330 US 1; 67 S Ct 504; 91 L Ed 711 (1947). The constitutional analysis in *Pierce* was grounded upon the "substantive" due process rights of parents with respect to the fundamental freedom of controlling the education and socialization of their children.

Such a right was recognized at common law. See, e.g. *Gordon*

In *Meyer, supra,* the Court held unconstitutional state legislation which prohibited "the teaching in school of any subject except in English," and "the teaching of any other language until the pupil has attained and successfully passed the eighth grade." *Id.*, 400. In finding that legislation to be violative of the Fourteenth Amendment, as applied, the Court noted that the education systems envisioned in Plato's "Ideal Commonwealth," and by the ancient Spartans, would be inconsistent with the nature of our constitutional democracy:

> "For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were

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v *Bd of Ed*, 78 Cal App 2d 464, 480; 178 P2d 488 (1947); *School Bd Dist No 18* v *Thompson*, 24 Okla 1, 4; 103 P 578 (1909); *Rulison* v *Post*, 79 Ill 567, 573 (1875). See also *People* v *Levisen, supra*, 577.

That parents should have the prior right, and primary role, in directing the education of their children was endorsed by the United Nations General Assembly in *The Universal Declaration of Human Rights*, GA Res 217, art 26 (1948) (cited in *Project, Education and the law: State interests and individual rights*, 74 Mich L R 1373, 1389, n 83 [1976]).

> wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." *Id.*, 401-402.

In *Bartels* v *Iowa*, 262 US 404; 43 S Ct 628; 67 L Ed 1047 (1923), the Court invalidated similar legislation which had been enacted in Iowa and Ohio. See also *Farrington, supra,* in which the Court invalidated, as violative of the Fourteenth Amendment, an Hawaii statute which interfered with the educational freedom of parents and their children.

In *Yoder, supra*, 233, the Court said that the "additional obligations" referred to in *Pierce* "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship," and stated that

> "*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."

In *Yoder*, the Court emphasized that this parental interest is particularly compelling combined with a free exercise claim. *Id.*

Because plaintiffs' challenge to the enforcement of the certification requirement is asserted within the context of the religious freedom guarantees of the First Amendment, independent consideration of their parental rights afforded by the Fourteenth Amendment would be unnecessary. Because I conclude that plaintiffs have established their burden of proof with respect to their free exercise claim, their parental privacy challenge may be considered simultaneously.[31]

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31. Consideration of the nature and scope of the unenumerated, though constitutionally recognized, fundamental "substantive" rights embodied in the Due Process Clause of the Fourteenth Amendment, and their application to determine the enforceability of the state legislation challenged in the present case,

Finally, plaintiffs challenge the certification regulation as violative of the Establishment Clause, asserting that it creates excessive entanglements between government and religious schools.

V

Consideration of plaintiffs' free exercise challenge requires, first, determining the applicable standard of review. The United States Supreme Court, in several recent decisions, has considered the standard of review applicable to state legislation which interferes with individuals' rights to freely exercise their religious beliefs. See, e.g., *United States* v *Lee*, 455 US 252; 102 S Ct 1051; 71 L Ed 2d 127 (1982); *Thomas* v *Review Bd of Indiana Employment Security Div*, 450 US 707; 101 S Ct 1425; 67 L Ed 2d 624 (1981); *Yoder, supra; Sherbert* v *Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963).[32] While the Court has not enunciated the applicable standard in identical terms, it has become increasingly clear that such legislation requires strict judicial consideration.

In *Lee, supra*, the Court said that "[t]he state may justify a limitation on religious liberty [only] by showing

would require independent analysis. Because plaintiffs have established that the legislation in question affirmatively regulates the exercise of their individual rights expressly afforded by the First Amendment, such independent analysis is unnecessary. It may be presumed, in light of the First Amendment's historical significance and the importance attached to the judiciary's obligation to safeguard the individual rights expressly protected therein, that no stricter standard of review would be mandated.

32. See also *Bob Jones University* v *United States*, 461 US 574; 103 S Ct 2017; 76 L Ed 2d 157 (1983); *Gillette* v *United States*, 401 US 437; 91 S Ct 828; 28 L Ed 2d 168 (1971); *West Virginia Bd of Ed* v *Barnette*, 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943); *Murdock* v *Pennsylvania*, 319 US 105; 63 S Ct 870; 87 L Ed 1292 (1943); *Cantwell* v *Connecticut*, 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940).

that it is essential to accomplish an overriding governmental interest." Inherent in determining whether the limitation is "essential" to the governmental interest, is consideration of whether accommodation by the state would "unduly interfere with fulfillment of th[at] governmental interest." *Id.*, 257-259.

Similarly, the Court, in *Thomas, supra*, 718, said that "[t]he state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." See also *Sherbert, supra*, 406-408. In *Sherbert*, 406, the Court said "[o]nly the gravest absues, endangering paramount interests, give occasion for permissible limitation." Referring to the nature of such a "compelling state interest," the *Thomas* Court quoted the following passage from the opinion of the Court in *Yoder, supra*, 215:

> "The essence of all that has been said and written on the subject is that only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." (Emphasis added.)

Thus, while not phrased in identical terms, the standard of review applied by the Court in its decision in each of those cases consistently reflects both aspects of a heightened scrutiny standard: inquiry concerning the magnitude of the state's interest, and the necessity of the means chosen to further that interest. Furthermore, and perhaps most noteworthy, in each of those cases the Court focused on the effect that accommodating individuals' free exercise rights would have upon the achievement of the asserted governmental interest, in considering the necessity of overriding their First Amendment freedoms.[33] For example, responding to the

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33. The rights protected by the Free Exercise Clause are individual rights, and the remedy afforded is exemption. In determining

State of Wisconsin's assertion that any incidental burden upon the free exercise rights of the religious observers in that case was justified because requiring school attendance of all children until the age of sixteen was essential to the achievement of the state's interest in compulsory education, the *Yoder* Court said:

> "Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed [religious observers'] exemption." *Yoder*, 221. (Citation omitted.)

The Court's most recent free exercise decision in *Bowen* v *Roy*, ____US ____; 106 S Ct 2147; ____L Ed 2d ____(1986), in which the Court was divided three-two-four, has not overruled or modified the standard of review consistently applied in each of those prior controlling decisions. The Court's five-to-four decision in *Goldman* v *Weinberger*, 475 US ____; 106 S Ct 1310; 89 L Ed 2d 478 (1986), is, of course, inapplicable. The issue presented in *Goldman*, which was expressly limited to the military context, concerned "the appropriate level of scrutiny of a military regulation that clashes with a constitutional right . . . ." 89 L Ed 2d 483. While Justice Boyle's assertion that "[t]he First Amendment makes no exception for the military" (slip opinion, p 17, n 27) is arguably persuasive, it was precisely that assertion

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whether some "compelling" governmental interest justifies overriding individuals' bona fide claims to the exercise of those rights, accordingly, the Court has consistently focused on the effect granting exemptions would have upon the achievement of the governmental interest asserted.

which was rejected in *Goldman*. The five-member majority, relying upon a long line of precedent, held that a lower level of scrutiny is applicable to claims of constitutional violations within the specialized military society. That *Goldman* was sui generis and, thus, has not affected the Court's generally applicable prior controlling decisions cannot be seriously questioned.

Thus, if the record in the instant case supports plaintiffs' claims that their refusal to comply with the teacher certification statute is based upon sincerely held religious beliefs, and that the certification requirement interferes with or burdens the free exercise of those beliefs, the determinative question requires an inquiry concerning the nature of the state's asserted interests, and the necessity of enforcing the certification statute, as applied, to further those interests. Inherent in this inquiry is consideration of the effect accommodation by the state would have upon the achievement of that interest. If accommodating plaintiffs' religious practices with regard to the employment of teachers would cause no ascertainable harm to the state's asserted interests, no ad hoc "balancing" concerning the extent of the burden upon plaintiffs' free exercise rights is necessary; if accommodation would cause no harm to the asserted interest, then no infringement of plaintiffs' First Amendment rights may be justified by characterizing the infringement as "minimal.[34] Likewise, if a less intrusive alter-

34. The analyses of my colleagues' opinions, in this regard, is curious. Both opinions agree, reluctantly, that plaintiffs have established that the regulation from which they seek exemption imposes a burden upon the exercise of their religious beliefs. Rather than turning to whether the state has established its required burden of proof to justify enforcing the regulation as applied, my colleagues then decide, without adequate explanation, that the interference with plaintiffs' religious beliefs is only "minimal." Neither opinion even considers whether granting plaintiffs' claimed exemption would interfere, to any extent, with the fulfillment of the state's asserted "compelling" interest.

The constitutional standard by which to determine whether the

native means is available by which the state may ensure the continuing fulfillment of its asserted "compelling" interest, that alternative must be employed.

A

Consideration of plaintiffs' free exercise challenge must begin with a review of the facts regarding the nature of plaintiffs' schools and the effect upon plaintiffs' exercise of religion posed by enforcement of the state's teacher certification requirement. Individuals seeking exemption from complying with an otherwise valid state regulation, claiming protection under the First Amendment's Free Exercise Clause, must establish that their objection to compliance is based upon sincerely held "religious" beliefs, and that the regulation, from which exemption is sought, interferes with or burdens the free exercise of those religious beliefs. *Lee, supra*, 256-257. In determining whether plaintiffs have sufficiently established that the certification statute interferes with the free exercise of their religious beliefs, due regard must be given to the factual findings and conclusions of the trial court. *Thomas, supra*, 716; *Lee, supra*, 257.

The record in this case, including the testimony of plaintiff pastors, parents, teachers, and children, and of qualified expert witnesses in both religion and education, clearly supports the trial court's conclusion that the certification statute substantially interferes with the free exercise of plaintiffs' religious beliefs. The record supports the following factual conclusions. Plaintiffs believe themselves required to establish and maintain schools as an integral part of their religious mission and consider

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state has established its burden of proof to justify enforcing state legislation against individuals who have established bona fide religious objections to compliance therewith is identifiable. That standard does not include determing whether the state, rather than those individuals, has more correctly interpreted those individuals' religious beliefs and requirements, nor does it allow the reviewing court to make such a determination.

the schools to be church ministries.[35] The record reflects that that belief stems from literal scriptural interpretation and represents a revival of the views of the earlist Christian movement, with roots in the Old Testament.[36]

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35. The pastors of each church testified that their religious beliefs require them to maintain schools as an integral part of their church. The following excerpt from the testimony of Rene B. Ouellette, pastor of the First Baptist Church of Bridgeport, is illustrative:

"*Q.* [*Plaintiffs' Attorney*] Does the church maintain and operate a school?

"*A.* [*Mr. Ouellette*] Yes, we do, the Bridgeport Baptist Academy.

"*Q.* Is the school incorporated?

"*A.* No, sir, the school is a ministry of our church and therefore not separately incorporated.

* * *

"*Q.* Can you describe the relationship between the church and the school?

"*A.* Yes. As I mentioned, the school is an integral part of the church's ministries. All of our teachers of our school are members of our church. We don't maintain a separate checking account for the school. In fact, all the teachers' paychecks come from the First Baptist Church general fund. The governing body of the church is also the governing body of the ministry. In every way we treat the school as one of the many ministries of our church.

"*Q.* Why does the church operate a school?

"*A.* The ony reason we operate our school is because the Bible says, Deuteronomy, chapter six, that we are responsible to give to our children a godly education. The reading of that chapter will bear out the fact that it is to be a continual education, not something that takes place occasionally or on the weekend, but something that is to be done on a daily basis. So we have a divine mandate to give godly teaching and instruction to our children." (Joint appendix, 60a.)

36. Plaintiffs intepret Deuteronomy, chapter 6, as *requiring* their churches to maintain and operate schools and their children to attend those schools.

Religious expert, Dr. Rousas J. Rushdoony, testified with respect to modern fundamentalist Christian beliefs, and their relationship to orthodox Christianity. Dr. Rushdoony described the relationship of plaintiffs' churches' schools to fundamentalism as follows:

> "The word 'church' to fundamentalism, because of it's biblical emphasis, is reproducing the meaning that characterized

the church in the early century and in terms of old testament faith. The church of the old testament and the days of the new testament was the synagogue. And the synagogue was made up of an instructional ministry on the Sabbath and a weekly week-day teaching ministry to children. The early church reproduced this pattern. Joseph Bingham, in his two-volume index of a few thousand pages, points out that the early church was a place of worship, a place of instruction for the young and a library. These were the three functions of the church in the early centuries of Christian era.

"Well, fundamentalism has gone back to that definition which, as I indicated, has roots in the old testament. In the old testament the ministry was two-fold: A priestly ministry that was sacrificial and levitical which was instructional. Deuteronomy 33:10 says that the function of the Levites is to be the instructors of Israel. And in Jeremiah 10:2 the warning is emphatically given from God, 'Learn not the ways of the heathen." So that education is to be a function of the levitical ministry.

"Well, the early church, of course, did not have a sacrificing priesthood; it had a levitical ministry, and therefore it carried on the functions of the synagogue. Now, this, with barbarian invasions and the overthrow of Rome, collapsed, was reestablished with the medieval church, with the onset of enlightenism and humanism. Again there was a collapse in the educational ministry. In this country state control of education began only with Horace Mann and his associates in the early 1830s. Now we are having a return to the older concept so that fundamentalist Christianity is reviving the historic faith at this point.

* * *

"The school is an integral part of the ministry of the church, since the ministry is an instructional ministry from the pulpit and from the classroom. Throughout its functioning the fundamentalist church is a levitical or instructional ministry." (Joint appendix, 187a.)

Dr. Rushdoony testified with respect to fundamental Christian teaching concerning the role of the state, the religious concept of limited state "sovereignty," and the historical origin of those beliefs in both American and world history. Responding to the question whether fundamentalist Christian faith has any scriptural mandates with regard to the education of their children, he said:

"Yes they do. They believe very strongly the children belong to the Lord, not to the State, and therefore they are to be

The plaintiffs' schools are pervasively religious; the biblical faith is applied to every subject offered in class. Every class, including those deemed by the state to be "secular" in nature, is taught from a religious perspective, and all the textbooks used are permeated with religious doctrine.[37]

The teachers in plaintiffs' schools must be members of the independent churches, "born again" Christians, and live Christian lives in and out of the classrooms, in addition to possessing the qualifications and ability to teach the academic subject matter.[38] Their role in the schools is considered a ministry for the inculcation of Christian principles, moral standards, and biblical beliefs

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NOTES *(Continued)*

reared in the nurture and admonition of the Lord. They believe that separation, the premise in terms in which their churches are established, applies very strictly also to their children as well as to their personal lives." (Joint appendix, 190a).

37. The record reflects that plaintiffs believe themselves religiously mandated to teach all subjects from a biblical perspective, in addition to independent Bible study. Accordingly, all textbooks used are written from a religious perspective, incorporate biblical scripture, and relate scriptural interpretation to each subject. Specific examples were offered at trial with respect to mathematics and biology textbooks. (Joint appendix, 64a-65a.)

38. The pastors from each church testified regarding the qualifications required to teach at their schools. Pastor Ouellette explained:

> "They have to have two types of qualifications. One type is a spiritual qualification. They must feel God has called them to this ministry. They must be born-again Christians. They must believe the Bible and live in and out of the classroom in accordance with our church and our faith. Then they must have the technical abilities to communicate truth to the students." (Joint appendix, 65a).

In determining a teacher's qualifications, educational background is considered by both churches. The record reflects, for example, that all of the teachers, teaching in grades one through twelve, employed by First Baptist Church Bridgeport are college graduates. (Joint appendix, 92a).

in the lives of the children they teach, in addition to providing a religious academic environment in which the students may develop scholastically.[39]

The teachers believe themselves to be "called" to engage in a ministry, a religious apostolate. Plaintiff teacher Kwaitkowski testified that, on religious grounds, she could not submit to the state certification regulations, even though her academic qualifications—having obtained an education degree from an out-of-state university—substantially qualifies her for provisional certification.[40]

The parents believe they are religiously required to provide their children with a fundamentalist education and that their children must be taught only by fundamentalist Christian teachers. On religious grounds, they may not enroll their children in a public school or the school of another denomination. They are deeply pleased with the education their children receive at their schools,

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39. Pastor Ouellette testified as follows:

"To teach in our school is a ministry. It is not simply an occupation or profession. It's a calling.

* * *

"It's a ministry first, because the teacher must give evidence to us that God is leading them to teach from a biblical perspective. We are not interested in folks who merely want a job.

"Secondly, it's a ministry because every teacher has as their goal reaching the child with the gospel of Jesus Christ. Seeing that child accept the Lord Jesus as their savior and as their Lord.

"Then every teacher has as their goal the inculcation into the child's life a behavior of Christian principles, moral standards that are found in God's word." (Joint appendix, 65a-66a.)

40. Ms. Kwaitkowski testified that she could not, consistent with her religious obligations, submit to state certification. The sincerity of Ms. Kwaitkowski's religious objection is substantiated by the fact, reflected in the record, that her educational background may substantially qualify her for provisional certification.

and are closely involved in the process.[41]

The sincerity of plaintiffs' religious beliefs is supported by continuous reference to literal scriptural interpretations, and was substantiated by expert testimony. The sincerity of plaintiffs' religious belief in total independence and separation is also substantiated by their refusal to accept any form of available public aid.[42]

The state does not contest plaintiffs' claims with regard to the bona fide "religious" nature, or sincerity, of their beliefs within the meaning of the First Amendment, but continues to assert that the certification requirement does not interfere with the free exercise of those beliefs. To the extent that the state's assertion requires a determination concerning the appropriate interpretation of plaintiffs' religious beliefs, it must be rejected. As the Supreme Court stated in *Thomas, supra,* 716:

> "[I]t is not within 'the judicial function and judicial competence . . . to inquire whether [plaintiffs or the Government has the proper interpretation of the plaintiffs'] faith. Courts are not arbiters of scriptural interpretation.' "

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41. The parents of children attending each school, including plaintiffs Mr. and Mrs. Swain and Mr. and Mrs. Munson, consistently testified with respect to the mandates and requirements of their religious beliefs, and the direct scriptural origin of those beliefs. Furthermore, each parent testified that they are very pleased with the education their children are receiving, including the level of academic achievement they have demonstrated objectively through performance on standardized achievement tests.

42. Religious expert, Dr. Rushdoony, substantiated plaintiffs' assertion that their fundamentalist beliefs require strict separation, and explained the historical origin and relationships of those beliefs in both world and American historical contexts. The record reflects that plaintiffs have refused all forms of available state, local, or federal aid and that refusal substantiates the sincerity of plaintiffs' religious beliefs with respect to total separation and their religious concept of state sovereignty.

The state's argument in this regard, with which Chief Justice Williams and Justice Boyle seem to be in agreement, is that plaintiffs do not object to employing a certificated teacher, and, therefore, the regulation does not interfere with the free exercise of their religious beliefs. That argument, however, reflects a misunderstanding of plaintiffs' religious objection and is a non sequitur; the statutory regulation from which plaintiffs seek exemption does not require employing *a* certificated teacher, it requires them to employ *only* certificated teachers. Moreover, plaintiffs stress that their teachers who have submitted to state certification did so before becoming members of their churches. Likewise, that regulation does not require employing only "academically qualified" or "competent" teachers. Nor has the state asserted that plaintiffs' teachers are in any way "incompetent" or "academically" unqualified. The regulation objected to requires employing only teachers who "hold a certificate such as would qualify him or her to teach in . . . the public schools of the state." Plaintiffs do not object to employing academically competent teachers. And, for example, the record reflects that all of the teachers employed by First Baptist Church Bridgeport, teaching in grades one through twelve, hold college degrees.

The record in this case establishes that the interference with plaintiffs' free exercise of religion is both apparent and substantial. Plaintiffs, by religious conviction, consider their schools to be religious ministries, and assert that the requirement that no one may carry out a ministry in their schools without a government license to do so, is in direct conflict with their religious beliefs. Plaintiffs consider their obligation to determine whom they shall employ a religious matter, and that the criteria by which to discern who to hire is likewise pervasively

religious.[43] On religious grounds, plaintiffs are prohibited from submitting their teaching ministry to the prior restraint of state licensing, requirements that their

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43. See ns 35-42. The plaintiffs' religious objection to compliance with the certification regulation was articulated by all of plaintiffs' witnesses. The religious conflict posed was articulated by Reverend Fluegge, principal, administrator of the school operated by Sheridan Road Baptist Church:

"Certification in the manuals from the State that I have read concerning certification refers to it as a license oftentimes. Licensing presupposes an agency or group or an entity that can designate what criteria by — it sets up the framework by which one must meet to be able to be licensed. Now I have a problem with that, because God has called our teachers to teach. He has already certified them in eternity. He has given us the criteria whereby we discern who we hire. And to place another entity or body above the local testament church and who it hires is to place somebody above God, and we cannot do that." (Joint appendix, 197a)

Pastor Ouellette, articulated the religious conflict presented as follows:

"It's based upon, first of all, a scriptural conviction that we have an obligation as individuals to obey God even if others would differ with us. In the book of Acts, chapter five verses 27 and 28 and 29, Apostle Peter and others have been charged 'not to teach in this name.' That's a quote. 'Peter and the other apostles answer and say, we ought to obey God rather than men.'

"So if the state were permitted to certify and require certification of all of our teachers, the very first, very negative affect it would have on us is they would be put into a position of determining whether or not a person is obeying God's call for their life.

"The second thing we have a problem with is because all of our teachers are church employees and church staff, the state has stepped into the area of licensing church staff.

"We have a further problem because, as I understand the laws of the State of Michigan, to get a continuing certificate, a teacher must take 18 hours of postcollege work, postgraduate work at a state-approved institution. The Bible tells us in Proverbs 19 and 27, '[c]ease to hear, my son, the instruction that causes you to err from the word of knowledge.' " (Joint appendix, 66a-67a.)

teachers be trained in state-approved teaching institutions, and other requirements imposed by the Teacher Certification Code, 1979 AC, R 390.1101 *et seq.*; 1981 AACS, R 390.1101 *et seq.*, which present numerous other burdens and limitations upon the freedom of the plaintiffs' teaching ministry. In addition to the general religious conflict created by imposing the prior restraint of the state certification requirement, plaintiffs find several of the specific requirements of the Teacher Certification Code to be offensive to their religious practices and beliefs.[44]

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44. Plaintiffs find several of the numerous provisions of the Teacher Certification Code offensive to their fundamentalist beliefs. See 1979 AC, R 390.1101 *et seq*; 1981 AACS, R 390.1101 *et seq*. Plaintiffs' objections in this regard stem, primarily, from their fundamentalist belief in strict adherence to literal biblical interpretation. Plaintiffs note that few people share their strict religious beliefs, and that the administrative rules with respect to teacher certification, teacher training programs at state-approved teacher training institutions, and modern education theory generally, reflect this divergence.

For example, rule 22(1) states:

> "An applicant for a provisional certificate shall demonstrate that he has an acquaintance with the substance, concepts, and methods of the principal areas of human knowledge, and skills essential to communication and inquiry in modern society."

Rule 23(1)(c) requires an understanding of:

> "The methods and materials of instruction appropriate to the elementary or secondary level."

Plaintiffs emphasize that their religiously required beliefs, with respect to education, are, necessarily, inconsistent with those of the state, and of the state-approved teacher training institutions within this state of which none are of the fundamentalist faith.

Likewise, the requirements imposed by Rule 15(2), and 25(1), that "[c] redits toward certification shall be completed through an approved teacher education institution," and that applicants "shall be recommended by a Michigan college or university" that has been so approved, present religiously based problems for plaintiffs.

The sincerity, and magnitude, of plaintiffs' religiously based objection to modern education theory is exemplified in Sheridan

The record in this case also supports plaintiffs' assertion that because of the special and strict religious requirements which they must observe in the selection of their teachers, the availability of teachers for their schools would be greatly reduced were they compelled to compromise their religious beliefs and comply with the certification requirement to employ only teachers who are licensed to teach in the public schools or be closed down.[45] Qualified education expert, Dr. Russell A. Kirk, testified that, as a practical matter, compelled compliance with the statutory regulation here in question would have a drastic effect upon the ability of independent church schools to employ teachers who meet their qualifications, and in many cases the effect would be prohibitive, forcing such schools to close.

That the state certification requirement interferes with the fundamental free exercise rights of William and Sharon Swain and Ronald and Janice Munson as parents, and of Susanne Kwaitkowski as a teacher, is also apparent.[46]

NOTES *(Continued)*

Road's *Parent-Student Handbook*, (Joint appendix, 363a-396a), in which the fundamentalist theory of education is contrasted with that of "the world."

45. The state has conceded that a direct effect of enforcing the regulation as applied to plaintiffs would be to limit the number of teachers qualified to teach at plaintiffs' schools. That enforcing the certification regulation would have a drastic and possibly prohibitive effect upon the ability of plaintiffs' schools to employ qualified teachers was substantiated by the testimony of education expert. Dr. Russell A. Kirk. (Joint appendix, 213a-214a).

46. The parents believe they are fulfilling their religious obligations and that their children are receiving an education of excellent quality. Ms. Swain testified that if Bridgeport Baptist Academy were to be closed down for refusal to submit to the certification regulation, she would have no choice but to keep her children at home and teach them herself, even though taking the time to teach her children every day "would be a hardship on [her] family." (Joint appendix, 132a-133a.)

Ms. Kwaitkowski would be prohibited from fulfilling her religious obligation within this state.

The teacher certification requirement compels plaintiffs to choose between compromising their religious beliefs and conforming to the state's administrative interests or being prohibited from maintaining and operating their schools and having their children compelled by law to attend a school against the wishes and religious beliefs of their parents. Plaintiffs' only other option would be to leave Michigan and seek another jurisdiction, the overwhelming majority of which do not impose state teacher certification requirements upon religious schools.[47] To the extent that the operation of plaintiffs' schools is religiously mandated, the certification statute directly regulates religious activity. Unlike the more indirect interferences with the free exercise of religion created by the legislation challenged in *Sherbert*, *supra*, *Thomas*, *supra*, and, more recently, in *Bowen*, *supra*, the state certification requirement does not confront plaintiffs with a choice between adhering to their religious beliefs and receiving a governmental benefit. Nor does it allow plaintiffs a choice between adhering to their religious belief and exercising a privilege. Cf. *Braunfeld* v *Brown*, 366 US 599; 81 S Ct 1144; 6 L Ed 2d 563 (1961). Unlike the legislation challenged in *Bob Jones University* v *United States*, 461 US 574; 103 S Ct 2017; 76 L Ed 2d 157 (1983), the state certification requirement "inescapably compels conduct that [plaintiffs] find objectionable for religious reasons." *Bowen*, *supra*, 106 S Ct 2154-2155. It, in every sense, "affirmatively compel[s] [plaintiffs], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons." *Id*. The interference, especially with respect to the rights of plaintiff parents, is certainly more substantial than the

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47. See n 58, for a list of the few states currently imposing state certification requirements. It has been noted that "[f]orced migration of religious minorities was an evil that lay at the heart of the Religion Clauses." *Yoder*, *supra*, 218, n 9.

indirect burdens imposed upon the free exercise of religion by the legislation challenged in those cases.[48]

My colleagues' representations of plaintiffs' claims are distorted. Justice Boyle's assertion, for example, that "certification itself is not opposed, but [only] the government compulsion to attain it," is misplaced, and does not relate to the challenged regulation. Plaintiff parents, churches, and pastors are not compelled to attain certification; the legislation challenged regulates whom they *must* employ to educate their children. Plaintiffs have specifically, and directly, challenged the enforcement of that legislation, and the factual record supports the trial court's findings that the challenged regulation does, in fact, substantially interfere with the free exercise of plaintiffs' *sincerely held* religious beliefs. See n 43.

B

That the legislation in question affirmatively interferes with religiously motivated activity does not, of course, end the analysis. The individual religious autonomy guaranteed by the First Amendment's Free Exercise Clause is not absolute, and the state may justify enforcing the regulation notwithstanding the interference with plaintiffs' religious freedom by showing that enforcement is essential to the fulfillment of a compelling state interest. The state agrees that the "compelling state interest" standard of review is applicable in the present case.[49] The state argues, however, that the certification requirement need only be "reasonably related" to furthering its "compelling" interest in compulsory education, in order to justify the infringement upon

48. The regulation "affirmatively compels [the plaintiffs] . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder*, *supra*, 218; *Sherbert*, *supra*, 402.

49. The state conceded, in its brief and at oral argument, that it was in agreement with plaintiffs that the compelling state interest standard of review applied by the Court in *Sherbert* is applicable in the present case.

plaintiffs' First Amendment rights. My colleagues' opinions ultimately rely upon that misapplication of the applicable standard of review, as did the Court of Appeals in reaching its decision in the present case.[50]

Determining whether the state has established that enforcing the teacher certification statute, as applied to plaintiffs, is essential to the achievement of its "compelling" interest requires an inquiry concerning the nature of the state's legitimate interests in *compulsory* education and the necessity of enforcing the certification requirement as applied to plaintiffs. "[O]nly those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." *Yoder, supra*, 215. (Emphasis added.)

It has long been established that the governmental interest in compulsory education is not unlimited.[51] See *Yoder, supra*, 215, 232-234. The Supreme Court's decision in *Yoder* is particularly instructive because the governmental interest asserted by the State of Wisconsin in that case, like the interest implicated in the present case, was the public interest in compulsory education. While the governmental interest asserted in the instant case is indistinguishable from the interest asserted by the State of Wisconsin in *Yoder*, the religious exemption plaintiffs seek is readily distinguishable from that which was

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50. See n 4. See also Part VI. Although through completely different analyses, both of my colleagues' opinions for affirmance would uphold the enforceability of the certification statute, in effect, by applying the rational-basis standard of review.

51. The governmental interest involved in this case, despite the rhetoric cited in the Chief Justice's opinion, is not the state's interest in providing the opportunity for all of its citizens to have access to good education. To the contrary, the governmental interest involved in this case is antithetical to educational freedom. The relationship of the private and parochial schools act of 1921 to the compulsory education act of 1903 is expressly conveyed in § 4 of the 1921 act. See text accompanying n 6. The societal interest involved in this case is identical to the governmental interest asserted by the State of Wisconsin in *Yoder*.

sought, and constitutionally mandated, in *Yoder:* Plaintiffs do not oppose conventional formal education, but only the statutory and administrative requirements that they employ only teachers who have complied with the state's certification rules.[52]

In order to justify overriding plaintiffs' fundamental First and Fourteenth Amendment rights, the state must establish that enforcing the certification requirement, without exception, is essential to ensure the adequate "secular" education required by the compulsory education law. The state conceded at the outset of the proceedings in this case, however, and the record supports the factual conclusion, that plaintiffs are providing a quality "secular" education for their children, without compliance with that statutory requirement.[53] The state's seemingly inconsistent position in this regard may stem from its misdirected focus, and, perhaps, misunderstanding of its burden of proof to justify overriding fundamental First Amendment rights. The religious freedom protections afforded by the Free Exercise

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52. Plaintiffs do not oppose formal scholastic education in any sense. Providing the opportunity for their children to obtain a high level of academic achievement is, indeed, a primary goal of plaintiffs' religious alternative to the state regulation in question, and the record reflects that plaintiffs' schools maintain strict academic discipline.

53. The state conceded, when questioned by the trial court at the conclusion of its opening statement, that it was "not at all" asserting that plaintiffs were failing to adequately educate their children:

"*The Court*: Mr. Gartner [Defense attorney], you are not coming before the Court claiming that the children at issue, relative to the plaintiffs, are receiving at this point in time inadequate education?

"*Mr. Gartner*: No, not at all.

"*The Court*: So we are talking primarily relative to the impact of the administrative rights here one way or another. It's not—there is no allegation on your part that the children are being deprived of an education or are being miseducated as a result of some factor which brings this before the Court?

"*Mr. Cartner*: No. No."

Clause of the First Amendment are "individual" rights. Consideration of whether individuals whose free exercise of religion is substantially burdened by state legislation are entitled to exemption from that otherwise valid state law, accordingly, requires that the focus be directed to the rights of those individuals. In establishing its burden of proof, in such cases, that enforcing the regulation is *essential* to the achievement of a compelling governmental interest, the state must show that granting an accommodation would "unduly interfere with [the] fulfillment of th[at] governmental interest." *Lee, supra,* 259.

In determining whether the governmental interest in compulsory education justifies overriding plaintiffs' individual rights protected by the Free Exercise Clause, therefore, the focus must be directed upon the effect accommodation would have upon the achievement of that interest. Nothing in the record in this case suggests that granting plaintiffs an exemption from the certification requirements would interfere with the state's legitimate interests in compulsory education. To the contrary, the uncontested evidence in this case supports the conclusion that plaintiffs are providing a more than adequate "secular" education for their children, to the legitimate extent required by the compulsory public education statute.[54]

Nothing in the record in this case intimates that granting religious exemptions from the certification requirement would present "grave and immediate" danger to the state's legitimate interests in compulsory education. *West Virginia Bd of Ed* v *Barnette,* 319 US 624,

54. All of plaintiffs' witnesses testified with respect to the quality and quantity of "education" provided the children attending plaintiffs' schools. That the children attending each school are progressing at acceptable and, indeed, above average levels of scholastic achievement is documented by the standardized academic achievement test results presented and made a part of the record in this case.

639; 63 S Ct 1178; 87 L Ed 1628 (1943). While the state has continuously asserted that the governmental interest in compulsory education is "compelling," it has presented no evidence that granting religious exemptions would have any adverse effect whatsoever upon the achievement of that interest, and the record supports a contrary conclusion. The ability of religious schools, similar to plaintiffs', to achieve and maintain excellence in education, without employing only teachers who are certified to teach in the public schools, was substantiated by uncontroverted expert testimony.[55]

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55. Education expert, Dr. Russell A. Kirk, for example, testified with respect to some of the variables which influence the success of religious schools and distinguished their methodology from that of the public schools. Dr. Kirk noted the superior discipline generally found in religiously related schools and the elevated level of teacher motivation, and accountability, in such schools as two factors contributing to their general success. (Joint appendix, 212a.) Dr. Kirk described the attributes of a "good" teacher in the following order:

(1) the ability to understand children and the yearning to teach them;

(2) earnestness; taking education seriously and children seriously;

(3) formal study of methods and tests.

Dr. Kirk concluded by opining that the state's interests in promoting quality education is best served by encouraging diversity and variety, competition, and freedom of choice, and, thus, that accommodating plaintiffs' religious conflict regarding complying with the certification regulation, rather than "wiping [them] out," would actually further the state's broad interest in education. (Joint appendix, 217a.)

The testimony of education expert, Dr. Donald A. Erickson, also supports the conclusion that plaintiffs can achieve excellence in education without compliance with the certification requirement. Dr. Erickson testified with respect to the factors or conditions which influence the success of "good" schools, with reference to empirical and scholarly research. He testified that the most important factor is the social climate of the school, "a climate of stable discipline," and "a focus on student learning" on the part of the students and their parents. Dr. Erickson testified with respect to the learning environment found in religious schools, as contrasted with the public schools, and discussed the results of empirical studies on the topic.

The state's interest in *compulsory* education is important, and identifiable; the state may require all of its citizens to achieve a given level of academic achievement to "prepare [them] to participate effectively and intelligently in our" democratic process, and to "prepare[] individuals to be self-reliant and self-sufficient participants in society." *Yoder*, 221. The uncontested evidence in this case, however, reflects that plaintiffs "are . . . fulfilling the social and political responsibilities of citizenship," legitimately imposed by the compulsory public education statute, without compelled compliance with the state's certification requirement "at the price of [compromising] their free exercise of religious belief." *Yoder*, 225. There is no indication that plaintiffs are failing to provide their children with the academic competence needed for political literacy and economic self-sufficiency. The state has conceded, moreover, that such is not the case.[56]

Any argument by the state that its legitimate authority as *parens patriae* requires upholding the enforcement of the certification requirement, as applied, to protect these children from their parents, must fail. The state has not even suggested that the "decisions [of plaintiffs-parents have] jeopardize[d] the health or safety of the child[ren], or have a potential for significant social

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Finally, Dr. Erickson emphasized that the commitment of teachers and involvement of parents in the educational process are positive factors, and commented with respect to data evidencing the existence of such involvement in religious schools. He further emphasized and explained that, unlike other professions (e.g., law, medicine, architecture), teaching is founded upon no clearly established knowledge base; it is in no sense comparable to professions which possess "a body of clinical knowledge," or a "body of accumulated wisdom," or "specific prescriptions for practice." He referred to empirical data in supporting his opinion that the governmental interest in compulsory education would not be threatened by granting religious exemptions for compliance with the certification regulation. (Joint appendix, 276a-284a.)

56. See n 53.

burdens." *Yoder*, 234. The record abundantly supports the conclusion that plaintiffs are actively pursuing and fulfilling the legitimate and important academic achievement and socialization interests underlying the compulsory education law.

The state has failed to show, in this case, that enforcing the certification requirement, as applied to plaintiffs, is essential to the fulfillment of its interest in compulsory education; establishing the mere "rational-basis" of enforcing the regulation to further the achievement of that public interest is, of course, insufficient.[57] On the other hand, a careful review of the record in this case, including the testimony of qualified experts and the documented record of student achievement, supports the conclusion that enforcing the certification requirement is not essential to the fulfillment of the state's asserted interest. The record abundantly supports the conclusion that accommodating plaintiffs' religious conflict to the state teacher certification requirement poses no threat to the state's interest in compulsory education.

In this regard, plaintiffs' uncontested assertion that the overwhelming majority of the states (forty-four) do not currently impose such a requirement upon the employment practices of nonpublic schools, without exception, should not be overlooked by this Court. [58] Unless we are to assume that those states are failing to achieve the adequate education of their citizens (a proposition that has not been suggested), that evidence is relevant and

57. The state was unable to establish any relationship in fact between compliance with the administrative teacher certification rules and increased quality in teacher competence and student learning. Dr. Donald A. Erickson testified with respect to the existence of extensive empirical evidence that no such relationship has been found. (Joint appendix, 281a-282.)

58. The few states currently imposing such regulations, other than Michigan, are: Hawaii (Hawaii Rev Stat, § 297-2); Idaho (Idaho Code, § 33-1201); South Dakota (SD Codified Laws Ann, § 13-4-2); Iowa (Iowa Code Ann, § 299.1) and Washington (Wash Rev Code Ann, § 28A.02.201.

should be considered. Moreover, it should be noted that the clear trend among those few states which have imposed such a requirement has been to abrogate teacher certification requirements for religious schools, or to provide exemptions for individuals who raise sincere religious objections to compliance.[59] Additionally, that the Legislature is curently considering legislation that would dramatically alter this state's teacher certification program,[60] and the current national interest concerning the quality of student achievement in the public school systems and the effectiveness of teacher training programs

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59. Alaska, North Carolina, West Virginia, and Vermont have recently repealed school approval or teacher certification requirements for church schools. See former Alaska Stat, § 14.45.010; NC Gen Stat, 115C-547 *et seq.*; Ala Code, § 16-28-1 *et seq.*; W Va Code, § 18-8-1, as amended; and Vt Stat Ann, tit 16, § 166a. Ohio has recently exempted religious schools from the requirement, Ohio Administrative Code, § 3301-35-08. Nebraska recently amended its statutory requirement that parents have their children taught only by certified teachers, allowing religious exemptions. Uncertified teachers must either take a nationally recognized teacher competency examination or offer other evidence of teacher competence. Nebraska Legislative Bill 928, amending Neb Rev Stat, §§ 79-201, 79-328 and 79-1701. Iowa is currently considering abrogating the certification requirement it had formerly imposed upon the recommendation of a specially assembled Governor's task force report. See Detroit News, December 2, 1985, *postscript*.

60. The State Senate introduced a bill, which recently received unanimous approval by the House Education Committee (SB 447). The bill was sent to the House Appropriations Committee for an examination of the potential costs, estimated to be $4.5 million, to develop and implement the program. The bill would institute radical changes in the certification program in that it would require the Board of Education to develop and administer basic literacy tests beginning in 1991, and teacher competency tests beginning in 1993. See Michigan Report, March 11, 1986, Report No 47, Vol 25, pp 2-3.

is relevant and should be considered.[61]

The record in this case reflects the lack of any evidence whatsoever that accommodating plaintiffs' religiously based conflict with the teacher certification requirement would interfere with the state's asserted interest in "assuring that an education is being provided for all of its youth." Brief of defendants-appellees, 19. Additionally, I am convinced that less burdensome alternative means exist by which the state can supervise and ensure the future fulfillment of that important interest.

The record in this case firmly supports the conclusion that the state can adequately supervise the fulfillment of its asserted interest by reviewing the academic achievement of plaintiffs' students, measured by their performance on national standardized academic achievement tests. Plaintiffs agree that such supervision is a substantially less burdensome form of regulation, and that no religiously based conflict would be created. Plaintiffs currently administer national standardized achievement tests beginning at the prekindergarten and kindergarten level, and such testing is pursued throughout the entire educational experience of the children attending plaintiffs' schools.[62]

Any assertion by the state that this alternative means is inadequate because the validity of such standardized achievement tests is questionable must be rejected. The record in this case, including the testimony of the state's own education expert, supports the conclusion that the validity of such tests is well-established and, indeed, that

61. See, e.g., Report of National Commission on Ecellence in Education, *A nation at risk*, p 5 (April 26, 1983), in which the National Commission on Excellence in Education reported its stark and dismal conclusions concerning the quality of public education throughout our nation.

62. Plaintiffs administer the tests early to diagnose any possible learning deficiencies, or to determine placement, and continue testing to monitor scholastic achievement throughout the student's entire educational experience. (Joint appendix 401a, 729a, 119a-121a.)

this alternative is a superior method of measuring student learning and good teaching.[63] The record supports the conclusion that a higher, and more objectively identifiable, correlative relationship exists between standardized achievement test results and student learning, than between state teacher certification and student learning.[64] The State Board of Education, moreover, has published its endorsement and approval of the use of such testing to measure and improve student achievement.[65]

Finally, any assertion by the state that reviewing achievement test performance, as an alternative means, is actually more intrusive upon plaintiffs' free exercise of their religious beliefs than enforcing the state certification requirement, must also be rejected. To accept that

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63. The state's education expert, Dr. Judith Lanier, testified that testing was "at the top" of her list of methods for measuring good teaching. (Joint appendix, 117a.) Education expert, Donald A. Erickson, also testified with respect to the acceptability and objective accuracy of testing as a method of measuring adequate teaching and student learning.

64. Dr. Lanier testified that she was unaware of any empirical evidence establishing any correlation between compliance with the administrative certification rules and teacher competence or student learning. She testified that such evidence does exist, on the other hand, establishing the accuracy and appropriateness of testing, and stated that testing is a superior method of determining good teaching and student learning. See n 63. Dr. Erickson testified that extensive research has established that no significant correlation exists between certification and competence or student learning, and that testing is an established and far superior method to determine student learning and teacher effectiveness. (Joint appendix, 284a.)

65. E.g., Michigan Educational Assessment Program, 1983-84, p 7.

"'Much is known about the use of testing results to improve student achievement.'" (Quoted in Post-argument brief of plaintiffs-appellants, p 2.)

The Superintendent of the Bridgeport Spalding Community School District testified that nationally standardized tests are employed in the public schools within that district. (Joint appendix, 236a-237a.)

proposition would require holding that the state, rather than plaintiffs, has correctly interpreted the mandates and restrictions of plaintiffs' religious convictions. The unwarranted implications of such a holding are obvious.[66]

The use of standardized achievement test results is an adequate, and perhaps even superior, alternative means by which the state can ensure that an "education is being provided to all of its youth," without infringing upon plaintiffs' fundamental First and Fourteenth Amendment freedoms. The state could request achievement test results along with the other information concerning the enrollment of students and courses of study to which plaintiffs are in agreement.

While the existence of other permissible means by which the state can adequately ensure its interest in compulsory education is not foreclosed, the record and constitutional considerations presented render clear the conclusion that enforcement of the teacher certification requirement, as applied, is not essential to achieve that objective. Unless and until the state can show otherwise, the enforcement of the statutory teacher certification requirement, as applied, would be violative of the First and Fourteenth Amendments. Accordingly, I would reverse the decision of the Court of Appeals, and reinstate the trial court's order enjoining the enforcement of § 3 of the private and parochial schools act as applied to plaintiffs. The state would still be able to enforce the teacher certification requirement to regulate the employment practices of nonreligious schools and religious institutions except where bona fide religious claims to exemption are implicated.

The accommodation required by the First Amendment's Free Exercise Clause would not, in the present case, run afoul of the Establishment Clause; the

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66. See *Lee*, *supra*, 257; *Thomas*, *supra*, 716.

accommodation required by the Free Exercise Clause reflects the neutrality that the Establishment Clause compels. *Yoder*, 234-235, n 22; *Sherbert, supra*, 409. While the Court has recognized the Establishment Clause concerns in light of the values protected by the Free Exercise Clause, exemptions necessary to vindicate free exercise rights have consistently been upheld.[67] *Id.* The First Amendment "mandates accommodation, not merely tolerance." *Lynch* v *Donnelly*, 465 US 668, 673; 104 S Ct 1355; 79 L Ed 2d 604 (1984).

VI

While my disagreement with the analyses of my colleagues is evident, I am compelled to express additional criticism because I am convinced that they, like the Court of Appeals in reaching its decision in the present case, have misapplied the standard of review mandated by the First Amendment for determining whether legitimate claims to the free exercise of religion may be overridden. I disagree with Chief Justice Williams' analysis in several respects, including his identification, and discussion, of the state's asserted "compelling" interest involved in this case, and the state's burden of proof to justify the overriding of plaintiffs' First Amendment rights. I am equally persuaded that Justice Boyle's opinion is internally inconsistent and, with all respect, does not support her ultimate conclusion that the state is not required, in this case, to justify the interference with plaintiffs' fundamental First and Fourteenth Amendment rights.

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67. See Marcus, *The forum of conscience: Applying standards under the Free Exercise Clause*, 1973 Duke L J 1217, 1235-1238; Giannella, *Religious liberty, nonestablishment, and doctrinal development: Part II, the nonestablishment principle*, 81 Harv L R 513 (1968).

A

Chief Justice Williams identifies the state's interest as "ensuring that *all* teachers have met certain minimum requirements . . . ." Slip opinion, 3. The Chief Justice, however, in his subsequent discussion, refers to the state's interest in the "education of its citizens" as the compelling interest involved. Slip opinion, 12. Finally, the Chief Justice reaches his analytical conclusion in reconciling the inconsistent identification of the "compelling" interest involved:

> "Therefore, to the extent that certification of teachers furthers education, it can be considered a compelling state interest." Slip opinion, 15.

Hence, Chief Justice Williams' identification of the "compelling" state interest involved culminates in narrowly construing that interest until it is actually identical to the means chosen to further it: How else could the state achieve its "compelling" interest in "certification of teachers" but to require "certification of teachers"? In considering whether a "less intrusive method" is available to the state, however, the Chief Justice returns to his identification of the governmental interest involved as "the education of . . . citizens." Slip opinion, 16.[68]

While the Chief Justice's failure to consistently identify the "compelling" state interest involved is confusing,

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68. Likewise, Justice Boyle's opinion fails to consistently identify the governmental interest involved (see, e.g., slip opinion of Boyle, J., pp 10, 20, 22, 23), ultimately concluding that "[t]he teacher certification requirement[ ] [is] a compelling state interest of [its] own right [as well as] a state regulation . . . to achieve the broader goal of quality education." Slip opinion, pp 23-24. Directly preceding that conclusion, however, Justice Boyle refers to the state's "compelling interest in *compulsory education*." (slip opinion, p 23), and earlier in the opinion as "the state's interest in assuring that every child receive at least a minimal education." Slip opinion, p 10.

the ultimate utility to his analysis is obvious. In considering the free exercise issue presented, the Chief Justice ignores the second aspect of the constitutionally mandated heightened standard of review: whether enforcing the certification requirement, as applied to plaintiffs, is essential to the fulfillment of the asserted "compelling" governmental interest. Chief Justice Williams avoids this crucial determination and concludes, as did the Court of Appeals, that as long as the state's interest in the "education of its citizens" is a "compelling" interest the state need only show that the certification requirement is theoretically rationally related to the furtherance of that interest to justify the infringement of plaintiffs' First Amendment rights. While the Chief Justice may, as the Court of Appeals did, find support for that standard of review in some of the decisions of the state courts of other jurisdictions,[69] that standard has been expressly rejected in the controlling decisions of the United States Supreme Court. *Sherbert, supra*, 406; *Yoder, supra*, 215.[70] Furthermore, that standard of review would render the fundamental protections afforded by the Free Exercise Clause meaningless; the First Amendment is not needed to protect individuals from "unreasonable" or "irrational" legislation.

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69. See *Nebraska ex rel Douglas* v *Faith Baptist Church*, 207 Neb 802; 301 NW2d 571 (1981), app dis 454 US 803 (1981), and *State* v *Shaver*, 294 NW2d 883 (ND, 1980) (to justify suppressing the free exercise of minority religious beliefs it is sufficient that the regulation in question is reasonably related to the state's interest in furthering quality in education).

70. Likewise, the better-reasoned decisions of other state courts have followed the controlling cases and rejected that standard of review. See *State* v *Whisner*, 47 Ohio St 2d 181; 351 NE2d 750 (1976); *Kentucky State Bd for Elementary & Secondary Ed* v *Rudasill*, 589 SW2d 877 (Ky, 1979), cert den 446 US 938 (1980). See also *State* v *Yoder*, 49 Wis 2d 430; 182 NW2d 539 (1971), aff'd, *Wisconsin* v *Yoder*, *supra*; *Parker Collegiate Institute* v *University of New York*, 298 NY 184; 81 NE2d 80 (1948); *Bangor Baptist Church* v *Maine Dep't of Ed*, 576 F Supp 1299 (D Me, 1983).

In addition to applying what is, in my opinion, an incorrect standard of review, the Chief Justice obscures the nature of the governmental interest involved in this case. The governmental interest involved in this case is not the state's interest in providing "the opportunity of an education"[71] to its citizens. Whether the state is achieving that compelling interest by providing access to "quality" in education through its public schools, while perhaps indirectly related to the issues raised in this case,[72] is quite distinguishable from the state's legitimate interests in *compulsory* education. The Chief Justice's emphasis on the importance of the state's interest in providing the opportunity of an education tends to obscure the nature of the state's interest in *compulsory* education which involves the state's legitimate interests in *compelling* its citizens to achieve "an education" and the extent to which the state may standardize, regulate, and compel the manner in which its citizens achieve "an education." Like *Yoder*, this case involves "the fundamental interests of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Yoder, supra,*

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71. My colleague's reference to *Brown* v *Bd of Ed*, 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954), is misplaced. The governmental interest involved in the present case does not concern providing access to education. The state's interest in the present case does not involve the protection of educational freedom, but, rather, the restriction of educational freedom.

The majority's attempt to characterize the religious exemption sought by plaintiffs as contrary to the state's goal of furthering educational freedom is perplexing. Accommodating plaintiffs' religious conflict in this case would have no effect whatsoever upon the state's interest in providing educational opportunities to all of its citizens.

72. The record reflects that the public school district officials who initiated the proceedings against plaintiffs' schools have published their economic interest in "prevent[ing] loss of students to nonpublic schools." See n 9.

232. The Court in *Yoder* said, referring to the legitimate, but constitutionally limited, governmental interest in *compulsory* education:

> "[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.*, 233.

B

Justice Boyle's discussion and application of the required standard of review and the factual record in this case is perplexing. Justice Boyle acknowledges that plaintiffs' First Amendment claims require reviewing the challenged legislation "under a strict scrutiny or compelling state interest standard." Slip opinion, p 3. She articulates that standard of review in the free exercise context as follows:

> " 'First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, *the government must show that granting the requested exemption will do substantial harm to that interest. . . .*' " (Emphasis added.) Slip opinion, p 3, quoting *Goldman* v *Weinberger*, 475 US ____, ____; 106 S Ct 1310, 1325; 89 L Ed 2d 478 (1986), O'Connor, J., dissenting.

Justice Boyle declines applying that standard of review in this case, however, ultimately concluding that she "do[es] not find it necessary to require the state in this case to show with more particularity how its compelling interest in compulsory education will be adversely affected by granting an exemption to

plaintiffs."[73] Slip opinion, pp 21-22. While the rationale asserted in reaching that conclusion is unclear, it seems to be based upon a "belief/action and direct/indirect" interference analysis (slip opinion, p 3), the Court's recent decision in *Goldman, supra*, and interpreting *Yoder, supra*, for the proposition that plaintiffs, in free exercise cases, have the burden to "clearly and convincingly" establish the existence of a lesser restrictive alternative to the challenged regulations. Slip opinion, p 14. I am persuaded that Justice Boyle's analysis does not support the ultimate and dispositive conclusion that the state may justify the interference with plaintiffs' constitutionally protected rights, in this case, without even attempting to show, indeed without even asserting, that an exemption would adversely affect, to any extent, the achievement of the state's interest.

The "belief/action and direct/indirect" dichotomies, discussed but not relied upon in Justice Boyle's opinion, have long been abandoned in the controlling decisions of the United States Supreme Court, inasmuch as either would be applicable in the present case.[74] The argument that the Free Exercise Clause protects only religious "belief" and, therefore, that religiously grounded "actions" are outside the protections of the First Amendment, accepted in *Reynolds* v *United States*, 98 US 145; 25 L Ed 244 (1879), was expressly rejected in *Cantwell* v *Connecticut*, 310 US 296; 60 S Ct 900; 84 L Ed 1213

73. Justice Boyle's opinion does not conclude that granting the requested exemption in this case would adversely affect the state's interest in compulsory education to any extent whatsoever. The state has never made such an assertion, and the extensive record in this case, including the testimony of the state's expert witness, would not support such a conclusion.

74. The applicability of Justice Boyle's discussion in this regard to her analysis in this case is unclear. Her opinion states that it is not relevant to the appropriate "level of judicial scrutiny," slip opinion, p 5, n 9, but that it is relevant to the "kind and quantity of proofs required by the government to satisfy the strict scrutiny test." *Id.*, p 6.

(1940), and again more recently in *Yoder, supra,* 219-220, in which the Court noted that several state courts were continuing to rely upon that rejected dichotomy. *Id.*, 219, n 10. See also *id.*, 247 (Douglas, J., dissenting in part).

Whether state action based on one's religious belief is, under any circumstances and in all cases, *absolutely* prohibited by the First Amendment is an issue not implicated in the present case. Plaintiffs have certainly not argued that their free exercise rights are absolute; their argument is that enforcing the constitutionally suspect legislation in question is not essential to vindicate a compelling state interest. Justice Boyle's statement that "this Court should be cautious in expanding the scope of the absolute protections afforded relief . . . lest we leave the government 'powerless to vindicate compelling state interests,' " (slip opinion, p 8), is, thus, misplaced, and her entire discussion in this regard, taken largely from *McDaniel* v *Paty*, 435 US 618, 626; 98 S Ct 1322; 55 L Ed 2d 593 (1978), is irrelevant to the issue presented in the instant case.

Likewise, the argument that legislation which imposes only indirect burdens upon the free exercise of religion (i.e., coerces individuals to choose between receiving a governmental benefit or privilege and adhering to religious belief) is outside the protections afforded by the Free Exercise Clause, or that such legislation mandates a lower level of judicial scrutiny, has consistently been rejected. See, e.g., *Bob Jones University, Lee, Thomas, Yoder, Sherbert* and *Braunfeld, supra.*

Like the discussion and application of the belief/action and direct/indirect analyses, Justice Boyle's discussion of the recent decision in *Goldman, supra,* is analytically unrelated to the ultimate premise which supports the basis of her opinion. Nevertheless, I am

compelled to express my disagreement with the implication in that opinion that *Goldman* has effected the standard of review applicable in free exercise cases which arise outside of the military setting.

Goldman is offered for the proposition that in free exercise cases "the higher in rank the governmental interest, the less the need for necessity to support the means chosen to achieve it even where paramount personal rights are directly burdened." Slip opinion, pp 17-18. That proposition seems to relate to the unsupported statement that "the Supreme Court has acknowledged that certain government interests are so compelling that the state need not show that the means chosen is absolutely essential to further that interest, and that no lesser restrictive alternative could be substituted." *Id.*, p 12.

That *Goldman* is *sui generis* because it concerned a military regulation is unquestionable. In deciding "the appropriate level of scrutiny of a military regulation that clashes with a constitutional right," the five-member majority, per then Justice Rehnquist, said, relying upon a long line of cases:

> " '[T]he military is, by necessity, a specialized society separate from civilian society.' "
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> * * *
>
> "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.' "
>
> * * *
>
> " '[W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community.' "
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> * * *
>
> "Our review of military regulations challenged

on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."

* * *

" 'Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.' " *Goldman, supra,* 89 L Ed 2d 483-484. (Citations omitted.)

The *Goldman* majority appears to have applied a rational-basis standard of review to the military regulation challenged in that case, although Justice Brennan, dissenting, described it as "a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.' " *Id.,* 489. (Brennan, J., dissenting, quoting the majority opinion, 484.) The four dissenters in *Goldman* were unpersuaded that a special exception from the generally applicable standard of review should be applied to military regulations. See *id.,* 489, n 2 (Brennan, J., dissenting); *id.,* 495-496 (Blackmun, J., dissenting); *id.,* 497 (O'Connor, J., dissenting).

Justice Boyle's ultimate analysis is based upon an interpretation of *Yoder, supra,* for the proposition that individuals asserting free exercise claims, in addition to having the burden of establishing that the regulation challenged interferes, in fact, with the free exercise of their sincerely held religious beliefs, also have the burden of establishing "the sufficiency of their alternative mode" of advancing the state's asserted interests. Slip opinion, p 15. I am persuaded that that proposition is not only unsupported by *Yoder,* it is internally inconsistent. Justice Boyle states that "once a plaintiff has established that a regulation burdens the exercise of religion, the state must establish that a 'compelling state interest' is at

issue and *that the interest cannot otherwise be served.*" (Emphasis added.) Slip opinion, p 11. The second aspect of the state's burden of proof in this regard relates to the necessity of enforcing the regulation to fulfill the state's asserted interest. Because the remedy in free exercise cases is exemption, that analysis requires the state to show that granting the exemption would interfere with the state's asserted interest. If the state has not shown that granting the exemption would, to any extent, adversely affect the achievement of the asserted "compelling" interest, it has not shown, a fortiori, that the interest "cannot otherwise be served" or that "no less intrusive alternative means" are available. In such situations, an entirely nonintrusive alternative is available, and the interest can otherwise be served because granting the exemption will not negatively interfere with the achievement of the asserted societal interest. In that situation, it is unnecessary to undertake an analysis of the extent of the burden upon the plaintiffs' religious beliefs, which necessarily entails the subjective interpretation of the centrality of those beliefs within plaintiffs' religion, to subjectively balance the degree of that burden against the extent an exemption would interfere with the state's interest. If the state cannot establish that granting an exemption would harm the state's interest to any extent, there is nothing against which to subjectively balance the restriction of plaintiffs' rights.

Justice Boyle's application of *Yoder* in the present case is inapposite. In *Yoder,* the Court implicitly conceded that the Amish children who failed to attend high school would not receive the same level of intellectual learning and, thus, that the state's objective would not be as fully realized if an exemption were given. The Court went further, however, and held that the resulting adverse effect upon the achievement of the state's interest did not *unduly* interfere with the fulfillment of that interest. Thus, the Court implicitly held that it was not quite sufficient for the state to show that an exemption

would impair its ability to fully achieve its goals; an exemption was required even at some slight sacrifice to the state's objectives. *Yoder,* thus, stands for the proposition that the state's interest must be read broadly and flexibly in determining whether that interest could still be fulfilled if an exemption were granted.[75]

Justice Boyle would apply *Yoder* in the present case to uphold the enforcement of the challenged legislation even though the state has not even shown that an exemption would impair its ability to *fully* achieve the societal goals of compulsory education. I emphasize that I have no quarrel with the *Yoder* Court's analysis. Rather, my quarrel is with what I believe to be Justice Boyle's mischaracterization of the *Yoder* Court's holding. See slip opinion of Boyle, J., p 14, n 25.

Contrary to Justice Boyle's assertions, the standard of review I would apply would not require the state to prove that "granting [an] exemption would effectively destroy the government's ability to achieve its purpose." Slip opinion, p 17. Nor have I intended to imply that "the claim of religious practice as well as the burden thereon is defined by the claimant and that scrutiny of the claim is perhaps beyond the competence of the judiciary." *Id.* Whether a plaintiff's objection to a regulation is based upon sincerely held religious beliefs is, of course, a factual question and, as such, is reviewable accordingly. If that question is determined in the negative, the court need not proceed to determining whether the state has established its burden to justify the enforcement of that regulation, as applied, because no bona fide religious objection had been established.

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75. See, e.g., Pfeffer, *The supremacy of free exercise,* 61 Geo L J 1115 (1973); Marcus, n 67 *supra;* Kurland, *The Supreme Court, compulsory education, and the First Amendment's religion clauses,* 75 W Va L R 213 (1973). See also, e.g., Tribe, Constitutional Law, § 14-10; Nowak, Rotunda & Young, Constitutional Law, Ch 19, § III.

In the present case, Justice Boyle seems to determine "that compliance with the state teacher certification program will [not] endanger or restrict the free exercise of [plaintiffs'] religious beliefs" (slip opinion, 19), although she does not expressly reverse the trial court's contrary factual determination. Nevertheless, she then proceeds to apply the "strict scrutiny" standard of review. See *id.*, p 10, n 17, and p 17. In applying that standard of review, however, she shifts the state's burden to justify the necessity of enforcing the challenged regulation upon plaintiffs to establish that its enforcement is unnecessary. The ultimate result is to avoid applying any degree of heightened scrutiny to the legislation in question and, instead, to uphold it, applying "closer scrutiny [to] plaintiffs' claims," *id.*, p 23, because "logic . . . indicate[s] that it furthers [the goals of compulsory education]." *Id.*, p 25.

Justice Boyle's analysis exemplifies the inappropriateness of the "balancing test" she asserts in construing the individual rights and concomitant limitations upon governmental authority embodied in the First and Fourteenth Amendments. While the methodology expressed concerning the applicable factors in applying that "balancing test" (slip opinion, pp 18-19) is sociologically interesting, such a discretionary nondefinitional standard provides no guidance to the judiciary in deciding free exercise cases and no ascertainable standard of appellate review. The constitutional principles consistently applied in the controlling decisions of the United States Supreme Court, to be sure, have resulted in striking a necessary balance between the rights of the individual and the interests of government. That balance, however, is a necessary end and not a means to avoid enforcing the limitations upon majoritarian authority inherently required to safeguard the fundamental individual rights which, by our form of government, have been withheld

from governmental restriction. It is beyond question that the state must justify restricting First Amendment rights; the individual need not justify nonrestriction.

C

Chief Justice Williams and Justice Boyle would uphold the enforcement of the teacher certification requirement as applied to plaintiffs (bona fide religious objectors) without adequately considering the fundamental individual rights at issue or the effect that accommodating plaintiffs' free exercise of those rights would have upon the achievement of the governmental interest involved. They reach their decision in this case, not by finding that enforcing the certification requirement is essential to the state's interest in education, but by dismissing plaintiffs' religious beliefs and practices as unimportant and characterizing the burdening of plaintiffs' free exercise of those beliefs as "minimal." Their insensitivity in this regard does not comport with this Court's constitutionally mandated responsibility to safeguard the individual freedoms guaranteed by the First and Fourteenth Amendments, and to enforce the limitations upon governmental authority commensurate therewith.

VII

Plaintiffs also contend that the intrusive and broadly expressed continuous regulatory authority over the existence and operation of their religious schools imposed by the private and parochial schools act of 1921 violates the Establishment Clause. Having expressly adopted the limiting constructions of the curriculum, licensing, supervision, and enforcement provisions of the act, discussed in part III, I would be persuaded that the teacher certification requirement alone would not create the excessive entanglement that the constitution forbids. I would emphasize, however, that my conclusion in this

regard would be premised upon the limiting constructions adopted.

I would note that plaintiffs' independent fundamentalist Christian schools are pervasively religious institutions, and that the burden imposed upon them by the state teacher certification requirement is substantial, because the criteria applied by plaintiffs in hiring faculty is necessarily religious. The regulation of plaintiffs' teacher employment practices as an integral aspect of their church-teacher employment relationship, therefore, necessarily implicates religious concerns. See *Tilton* v *Richardson*, 403 US 672; 91 S Ct 2091; 29 L Ed 2d 790 (1971); *Lemon* v *Kurtzman*, 403 US 602; 91 S Ct 2105; 29 L Ed 2d 745 (1971). Intrusions into the teaching function of religious schools may cause excessive entanglement. *New York* v *Cathedral Academy*, 434 US 125; 98 S Ct 340; 54 L Ed 2d 346 (1977); *Meek* v *Pittenger*, 421 US 349; 95 S Ct 1753; 44 L Ed 2d 217 (1975); *Catholic Bishop, supra*. See also *Dayton Christian Schools* v *Ohio Civil Rights Comm*, 766 F2d 932 (CA 6, 1985); *NLRB* v *Bishop Ford Central Catholic High School*, 623 F2d 818 (CA 2, 1980).

Nevertheless, I would be unable to conclude that the teacher certification employment regulation alone results in creating excessive church-state entanglement to an extent violative of the Establishment Clause.

VIII

In summary, I would resolve several of the constitutional issues originally adjudicated on nonconstitutional grounds by expressly adopting a limiting construction of the curriculum, licensing, and supervision provisions of the act, and reverse the decision of the Court of Appeals to the extent that it is inconsistent with the limiting constructions adopted.

Further, I would reverse the decision of the Court of Appeals with regard to plaintiffs' free exercise challenge

to the enforcement of the teacher certification regulation and reinstate the trial court's decision enjoining the enforcement of that statutory requirement as applied. The enforcement of the teacher certification statute, which would allow closing down plaintiffs' schools and compelling the children attending those schools to attend the public schools or an "approved" nonpublic school against the wishes of the childrens' parents, would be violative of the First Amendment's Free Exercise Clause. The state has not established, to the extent required by the constitution, the necessity of overriding plaintiffs' First Amendment rights; establishing that the teacher certification regulation is *rationally related* to the governmental interest in compulsory education, however strong that interest may be, is insufficient. Until the state can show otherwise, plaintiffs, who have established a bona fide religious conflict to compliance with that statutory regulation, are constitutionally entitled to exemption.

Finally, I would hold that the teacher certification provision of the act does not violate the Establishment Clause.

/s/ Dorothy Comstock Riley
/s/ Charles L. Levin
/s/ Michael F. Cavanagh

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

No. 69050

SHERIDAN ROAD BAPTIST CHURCH,
FIRST BAPTIST CHURCH BRIDGEPORT,
REVEREND GERALD SOMERO,
REVEREND RENE B. OUELETTE,
WILLIAM SWAIN and SHARON SWAIN, his wife,
RONALD MUNSON and JANICE MUNSON, his wife,
and MRS. SUSANNE KWAITKOWSKI,
Plaintiffs-Appellees,

v.

STATE OF MICHIGAN, DEPARTMENT OF
EDUCATION and SUPERINTENDENT OF
PUBLIC INSTRUCTION,
Defendants-Appellants,

and

MICHIGAN EDUCATION ASSOCIATION
and CATHOLIC LEAGUE FOR RELIGIOUS &
CIVIL RIGHTS,
Amici Curiae.

February 7, 1984

BEFORE: M.J. Kelly, *P.J.*, Harold Hood and
J.H. Shepherd, *JJ.*

JOHN H. SHEPHERD, *J.*

Defendants appeal from the trial court's finding that state laws requiring certification of teachers in nonpublic schools, and mandating certain courses and curriculum standards in such schools, violate plaintiffs' right to freely exercise their religious beliefs, US Const,

Am I, and its order enjoining enforcement of the same as to plaintiffs. In his written opinion, the trial judge also held that the teacher certification requirement and state supervision of parochial schools cause "excessive government entanglement with religion" in violation of the First Amendment to the United States Constitution, *supra*. We disagree and reverse.

The Legislature has placed supervision of nonpublic schools within the authority of the defendant superintendent of public instruction:

> "The superintendent of public instruction is hereby given supervision of all the private denominational and parochial schools of this state in such matters and manner as is hereinafter provided. * * * It is the intent of this act that the sanitary conditions of such schools, the course of study therein, and the qualifications of the teachers thereof shall be of the same standards provided by the general school laws of the state." MCL 388.551; MSA 15.1921.

A person employed as a teacher in such a school is required to hold "a certificate such as would qualify him or her to teach in like grades of the public schools of the state." MCL 388.355; MSA 15.1923. Certification requirements are determined by the State Board of Education, MCL 380.1531; MSA 15.41531, and are set forth in II Michigan Administrative Code 1979, p 2900; R390.1101 *et seq*. An applicant for a teaching certificate must have completed "not less than 40 semester hours in a program of general or liberal education." R390.1122(1), and must hold a bachelor's degree from a college or university approved by the State Board of Education. R390.1125(1). Provision is made for certification of applicants who attended accredited institutions in other states. R390.1130, 1154.

The compulsory education provision of the state school code of 1976, MCL 380.1561(3)(A); MSA 15.41561(3)(A) reads in part as follows:

"A child shall not be required to attend the public schools in the following cases:

"* * * A child who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located."

Local school boards are charged with determining the courses of study to be pursued in each school district. MCL 380.1282; MSA 15.41282. The only nonpublic school courses specifically mandated by the state are Federal and State Constitution and Government and high school Civics. MCL 380.1166; MSA 15.41166. The state's regulation of nonpublic school curricula consists of a simple review of the availability of various academic courses. The Department of Education has determined that plaintiffs' schools offer courses comparable to those of public schools. The curriculum review does not include an evaluation of teaching or course content.

Nonpublic schools are required to submit records of enrollment, courses of study and teacher qualifications upon demand by the state. MCL 388.555; MSA 15.1925. A school's failure to comply is "considered sufficient cause to suspend the operation of said school" following notice and a hearing before the state superintendent. *Id.*; MCL 388.554; MSA 15.1924.

On December 8, 1980, plaintiffs filed a complaint for declaratory and injunctive relief alleging, *inter alia*, the following:

(1) The plaintiffs include a teacher, pastor, parents, and churches who adhere to a fundamentalist Christian faith;

(2) Plaintiffs have established two Christian schools for their children;

(3) The schools "are Christian enterprises which are conducted as an integral part of [plaintiffs'] religious mission";

(4) The schools "involve substantial religious activity and purpose" and do not divide instruction into religious and secular components and;

(5) The schools "employ teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school."

It is further alleged that the defendant superintendent had instituted proceedings to determine if the schools' operation should be suspended for failure to meet statutory requirements and that plaintiffs had refused to comply for reasons of religious conviction, as compliance "would substantially limit and interfere with the religious mission of the churches". Plaintiffs claimed that imposition of the curriculum and certification requirements would violate the free exercise clause of the First Amendment by depriving them of the liberty to carry out their religious mission of Christian education, without a compelling state interest in the imposition of such requirements. They also claimed "the requirements necessitate excessive entanglement between government and religion." Plaintiffs prayed for issuance of an *ex parte* temporary restraining order forbidding enforcement of the requirements, as well as permanent injunctive relief. The trial court granted the temporary restraining order the same day but vacated it on December 22, 1980 upon an agreement by defendants to refrain from further administrative action against plaintiffs pending its final decision.

Defendants filed an answer and counter-claim on February 17, 1981, seeking mandatory injunctive relief against plaintiffs' refusal to submit school records to the state. MCL 388.555, *supra*. A six-day non-jury trial was held.

Both of the schools operated by plaintiffs offer a kindergarten through twelfth grade program. Each school offers courses in a wide variety of secular, academic subjects, including Civics, American Government, Mathematics, English and Science. The schools employ some teachers who have compiled with certification requirement and some who have not. The State Department of Education annually requests reports from nonpublic schools on enrollment and teacher qualifications but plaintiffs refused to submit such records to the state during the 1979-80 academic year.

Plaintiffs believe that sovereignty is a religious concept under which only God, not the state, is supreme over man. They believe any attempt by the state to control or license their educational "ministry" is an infringement on their religious liberty. They also object to state control over their school curricula because, according to plaintiffs, it could force them to teach objectionable matter or interfere with religious teaching. They believe that reporting student enrollment to the state is synonymous with state control. While their religion does not prevent them from hiring certified teachers, it forbids them from consenting to the state's requirement that teachers in their schools be certified. Plaintiffs contend that the "humanistic" education courses which are requisite to obtaining certification conflict with their own biblical beliefs. In short, the plaintiffs are opposed to any effort by the state to dictate the qualifications of the teachers employed by, or courses taught in, their schools.

Plaintiffs called as witnesses two experts in the field of education, each of whom criticized teacher certification requirements as ineffective guarantors of adequate performance. One of these experts went so far as to state that certification actually produces mediocrity. Defendants' expert witness testified that, without certification, there would be no safeguard against incom-

petence but admitted lacking knowledge of any study showing a correlation between certification and teacher performance.

The trial judge found the religious beliefs of plaintiffs sincere and that the state regulations at issue interfered with the practice of those beliefs. He concluded that "defendants have failed to show that teacher certification is a reasonable or effective means to carry out a legitimate state purpose." In addition, he held the curriculum standards invalid because they do not ensure uniformity in educational quality in the state but "merely [require] that nonpublic schools be as good as, or as bad as, the public schools in the district." The trial judge noted the interest of local school districts "in maintaining enrollment in the public schools since each student lost [*i.e.*, to parochial schools] means substantial loss of revenue to that district." The court held also that the regulations cause excessive government entanglement with religion and, therefore, MCL 388.551 and MCL 388.553, *supra*, are unconstitutional. The court upheld the state's authority to investigate the records of nonpublic schools, MCL 388.555, *supra*, but ruled that the information thereby obtained "may be used for statistical and comparison purposes only." The trial judge's successor entered a judgment reflecting his written opinion.

I. THE CURRICULUM AND TEACHER CERTIFICATION REQUIREMENTS DO NOT VIOLATE PLAINTIFFS' RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The free exercise clause was made applicable to the states in *Gitlow* v *New York*, 268 US 652; 45 S Ct 625; 69 L Ed 2d 1138 (1925). In *Sherbert* v *Verner*, 374 US 398, 403-407; 83 S Ct 1790; 10 L

Ed 2d 965, 969-972 (1963), the Court applied a three-part inquiry to determine whether the government had impermissibly infringed upon the appellant's right to practice her religious beliefs: First, whether the belief, or the conduct motivated by the belief, is religious in nature; second, whether the state regulation imposes any burden on the free exercise of religion and; third, whether some "compelling state interest" justified the burden placed upon the First Amendment right. *Id.*, 374 US 398,406.

In applying the first part of the *Sherbert* test, it should be noted that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Wisconsin* v *Yoder*, 406 US 205, 215; 92 S Ct 1526; 31 L Ed 2d 15, 25 (1972). Writing for the majority in *Murdock* v *Pennsylvania*, 319 US 105, 109; 63 S Ct 870; 87 L Ed 1292, 1296-1297 (1943), Justice Douglas rejected the notion "that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment." Here, however, defendants concede and the evidence is uncontroverted that plaintiffs' objections to state regulation of their schools are firmly rooted in the Fundamentalist doctrine to which they adhere. While not all Christian denominations share plaintiffs' perceptions of the educational implications of their particular view of religion, it remains true that the Fundamentalist doctrine of plaintiffs is a *religious* doctrine within the meaning of the term religion as found in the United States and Michigan Constitutions and any interference with plaintiffs' beliefs by the state must satisfy the stringent demands placed upon the state before such interference can be constitutionally justified.

"The party alleging a First Amendment violation has the burden of proving that the regulation in question imposes a burden or a restriction on the exercise of his or her religious beliefs." *Hough* v *North Star Baptist Church*, 109 Mich App 780, 783; 312 NW2d 158 (1981). "Hence it is necessary in a free exercise case to show the

coercive effect of the enactment as it operates against [the party] in the practice of [its] religion." *Abington School District* v *Schempp*, 374 US 203, 223; 83 S Ct 1560; 10 L Ed 2d 844, 858 (1963). The fact that a law does not compel a violation of conscience or that it applies to a general category of conduct does not end the inquiry. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement of governmental neutrality if it unduly burdens the free exercise of religion." *Yoder, supra*, 406 US 205, 220; *Thomas* v *Review Board of the Indiana Employment Security Division, et al*, 450 US 707, 717; 101 S Ct 1425; 67 L Ed 2d 624, 633 (1981). Furthermore, the law may be invalid on this ground even though the burden is only indirect. *Sherbert, supra*, 374 US 398, 404.

In this case, plaintiffs claim the curriculum regulations and teacher certification requirement place an unlawful burden on the exercise of their beliefs, and the trial judge so held. It appears that plaintiffs' schools fully comply with the curriculum standards demanded by defendants. Plaintiffs' objection is based on the belief that the state has no right to regulate their school programs in any manner. However, the state does not seek to regulate the concept of textbooks used, or the manner in which courses are taught in the schools. We therefore believe that any burden on plaintiffs' beliefs is not constitutionally significant. Similarly, the teacher certification rule has not prevented plaintiffs from hiring teachers who meet their specifications, as well as the state's qualifications. Persons who earn degrees from accredited, private colleges and universities may qualify for teacher certification. In addition, "an applicant may satisfy any educational requirement for certification by presenting evidence of an equivalent as determined by the state board." II Michigan Administrative Code 2909; R390.1152. Equivalence may be based on college graduation, scores on standardized examinations, or prior teaching experience. *Id.* Emergency, temporary permits

may be issued for persons "with reasonable qualifications when failure to authorize the permit will deprive children of an education." R390.1145.[1]

Plaintiffs have no religious objection to having their children taught by certified teachers. Once again, it is the very concept of state regulation which they abhor. There is no showing that compliance with the requirement would render the mission of their schools impractical or impossible.

Posed against this minimal burden is the state's interest in the quality of education. "When state action results in a denial of one's legitimate exercise of religious freedom, the state must show an overriding interest of the highest order to justify that action." *Fisher* v *Fisher*, 118 Mich App 227, 231; 324 NW2d 582 (1982). This Court must "searchingly examine" the state's interest and the detrimental effect that might result from exception of plaintiffs from the regulation. *Yoder, supra*, 406 US 205, 221. "Even if a compelling secular interest is shown, the state will be permitted to intrude upon an individual's religious freedom only if alternative, nonintrusive means are not available." *Fisher, supra*, 231-232, citing *Sherbert, supra*, 374 US 298, 407.

The present state constitution declares that "[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Const 1963, art 8, §1. This provision, "coupled with the

1. At oral argument, we asked the Assistant Attorney General whether the plaintiffs' schools may hire otherwise qualified, noncertified teachers who meet plaintiffs religious standards as long as such teachers undertook to qualify for certification subsequent to being hired. The Assistant Attorney General replied that he understood this to be so. We interpret R390.1145 to authorize such a procedure if plaintiffs demonstrate any difficulty in obtaining religiously qualifed personnel. As so interpreted, the statutory and regulatory scheme imposes no undue hardship on plaintiffs in seeking prospective teachers who share their Fundamentalist religious views.

fact that legislation in this State upon the subject of education has from the beginning been of the most liberal character, indicates a settled purpose on the part of the State to provide, foster, and protect educational facilities for all." *Dennis* v *Wrigley*, 175 Mich 621, 625; 141 NW 605 (1913). "It has always been the policy of this State, as indicated by the provisions of its Constitution and a long line of legislative enactments, to encourage the cause of education." *Michigan Female Seminary* v *Secretary of State*, 115 Mich 118, 120; 75 NW 131 (1897).

On several occasions, the United States Supreme Court has assumed that this strong state interest in the education of its youth extends to private as well as public schools. In *Pierce* v *Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925), the Court stated:

> "No question is raised concerning the power of the state reasonably to regulate *all schools*, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 US 510, 534. (Emphasis added.)

"Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at schools which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Board of Education* v *Allen*, 392 US 236, 245-246; 88 S Ct 1923; 20 L Ed 2d 1060, 1067 (1968) (citations omitted). The state "has a proper interest in the manner in which [private] schools perform their secular educational function." *Id.* See also, *Lemon* v *Kurtzman*, 403 US 602, 614; 91 S Ct 2105; 29 L Ed 2d 745, 756 (1971); *Everson*

v *Board of Education*, 330 US 1, 18; 67 S Ct 504; 91 L Ed 711, 725 (1947); *Meyer* v *Nebraska*, 262 US 390, 402; 43 S Ct 95; 67 L Ed 1042, 1046 (1923).

The courts of other jurisdictions, when faced with similar issues, have held in favor of the state. See cases collected in 18 ALR, 4, p 649 *et seq.* In *State ex rel Douglas* v *Faith Baptist Church*, 207 Neb 802; 301 NW2d 571 (1981), *app dis*, 454 US 803 (1981), a parochial school refused to request state approval on the ground that the state had no authority over its operation since it was an extension of a church ministry. The Nebraska Supreme Court, noting "the critical interest which the State has in the quality of the education provided its youth", upheld the state's teacher certification and curriculum requirements. *Id.*, 301 NW2d 571, 579. "Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished." *Id.* The Nebraska laws relating to curriculum, like those at issue here, are "very minimal in nature," *Id.*, requiring only that certain subjects be taught. "There is no effort to dictate in what manner that knowledge shall be imparted." *Id.*, 579-580.

State v *Shaver*, 294 NW2d 883 (ND S Ct, 1980) also involved issues similar to those presented by the instant litigation, namely, the validity of state laws requiring teacher certification and mandating that certain courses be offered. The school in question employed no certified teachers and the people concerned with it were, for religious reasons, "vehemently opposed to securing state approval required by state law." *Id.*, 893. However, the school's curriculum, like plaintiffs' here, met state requirements. *Id.*, 894. Thus, the school opposed state regulation but did "not forbid compliance with any of the specific requirements of state law." *Id.*, 895. The North

Dakota Supreme Court found the burden on free exercise of religion "minimal". *Id.*, 897. "The incidental burden on the free exercise of the parents' religion as a result of the state approval requirement is justified under the circumstances by the state's compelling interest in the regulation." *Id.*, Accord, *State* v *Rivinius*, 328 NW2d 220 (ND S Ct, 1982), *cert den*, 75 L Ed 2d 948 (1983); *Meyerkorth* v *State*, 173 Neb 889; 115 NW2d 585 (1962), *app dis*, 372 US 705 (1963); *New Jersey State Board of Higher Education* v *Shelton College*, 90 NJ 470, 448 A2d 988 (1982).

There have been several cases in which statutes governing nonpublic schools were held invalid. However, the regulations under attack were so intrusive and all-encompassing as to vitually abolish the distinction between public and private schools or render the existence of the latter impossible, thus depriving parents of their right to direct the education of their offspring under the due process clause of the Fifth and Fourteenth Amendments. *Pierce, supra.* In the case of *Farrington* v *Tokushige*, 273 US 284, 293-295; 47 S Ct 406; 71 L Ed 646 (1927), the statute governing foreign language schools prohibited their operation before "or during the hours while the public schools are in session", forbade attendance in such schools for more than one hour per day or six hours per week, gave the State Department of Education authority to establish the complete curricula in the schools, and prohibited the use of any textbooks "other than as prescribed or permitted by the department.

In *State* v *Whisner*, 47 Ohio St 2d 181, 351 NE2d 750 (1976), the Ohio Supreme Court held that the state's standards relating to the operation of schools infringed upon the parents' right to freely exercise their religion. The standards allocated instructional time "almost to the minute", 351 NE2d at 765, and required " 'all activities' of nonpublic schools to conform to policies adopted by the board of eduation." *Id.*, 765-766. Additionally, the

state required religious schools to cooperate with elements of their surrounding communities. *Id.*, 767. *Whisner* was distinguished by the Court in *Shaver, supra*, 294 NW2d at 898, which observed: "The Ohio minimum standards were self-contradictory and extreme in their effort to achieve equivalency in public and private education."

There has been no showing in this case that the burden placed on plaintiffs' schools by state regulation is as onerous as in the above-cited cases. The state does not regulate the manner in which courses are taught in the schools, require prior state approval of textbooks, or intrude upon the scheduling of classes in the schools. Certain courses must be offered but once the curriculum requirements are met the schools are free to infuse all courses with their religious beliefs and they are free to offer whatever additional courses they wish. The laws "are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position." *Gillette* v *United States*, 401 US 437, 462; 91 S Ct 828; 28 L Ed 168, 188 (1971).

The plaintiffs cite *Kentucky State Board of Elementary & Secondary Education* v *Rudasill*, 589 SW 2d 877 (1979), *cert den*, 446 US 938 (1980), in which the Kentucky Supreme Court held that the state's teacher certification, textbook approval, and school accreditation requirements violated the Kentucky Constitution. The court relied solely upon a section of the state bill of rights providing that no man "be compelled to send his child to any school to which he may be conscientiously opposed." 589 SW2d 877, 879. There is no similar section in the Michigan Constitution.

Plaintiffs contend that there is no evidence that teacher certification ensures high quality of instruction and their expert witnesses so testifed at trial. Indeed, the effectiveness of certification in this regard is somewhat open to question:

"The certification process in most states involves the mere mechanical adding up of the credit hours the applicant has had in Education and in other subjects, no matter what their quality might be. If he is short of the stipulated amounts, regardless of any other possible qualifications, he cannot be certified (except in some cases as an 'emergency' or 'substandard' teacher). Thus are created those legendary and amusing anomalies of certification: the fact that Einstein could not be licensed to teach third-grade arithmetic, or that a learned Frenchwoman could not be admitted to teach French in any American public school, or that Leonard Bernstein would not be competent to teach music to any public school student, or that many professors of Education, those who teach teachers how to teach, could not themselves be licensed to teach in any public school.

"There is no very precise way of measuring the deleterious effects of the obtuse administration of certification laws, but a good deal of individual testimony exists, for what it is worth, to the effect that the brightest students find these laws a severe deterrent to entering teaching, as do many mature people who could bring to the classroom a lifetime of experience and accomplishment but who happen not to have any Education courses on their record and who cannot face the prospect of getting any. How well the licensing laws still fill their original function of saving the schools from incompetent teachers is not clear. The incompetent teacher today is a great deal more competent with a great deal more education, than was the incompetent teacher in the early days of certification, when he might have no work beyond high school and often not that much. Today incompetence means chiefly the lack

of Education courses. In view of the quality of teachers who *are* often certified today with a full complement of Education courses and then some, and in view of the quality of person who is often not certifiable despite a first-rate liberal education and demonstrated intellectual achievements — one wonders just what kind of incompetence public schools are now being saved from by the state departments of Education." Koerner, *The Miseducation of American Teachers* (Houghton Mifflin Co, ed 1963), ch 7, pp 207-208. (Emphasis in original.)

Plaintiffs argue that a less intrusive means of guaranteeing educational quality is available, namely, standardized testing of students. However, the validity of such examinations is itself an issue and the tests may be administered too late to remedy the harm they are meant to prevent. We also note that standardized testing would very likely be designed to test secular subjects, would have a non-religious orientation and would enable the state to become as much or more involved with the manner of teaching courses as the existing regulatory scheme. As noted by the Court in *Rivinius, supra*, 328 NW2d 220, 229:

> "We recognize that neither certified teachers nor standardized testing are perfect means to insure the end sought to be attained. Neither one is an exact science, but is concerned with probabilities. Each method which purports to measure learning can be questioned as to its validity.
>
> "Standardized testing ordinarily does not result in the discovery of a deficiency in education until after the term, semester, or the school year is over, which would, in effect, result in a child wasting its period of time if the results of the standardized test

indicated that the child's education was deficient. We do not believe such a result would satisfy the state's interest in educating its youth.

"Although we are cognizant that teacher certification may also have its deficiencies, we believe that teacher certification is an acceptable method of satisfying part of the constitutional mandate to the legislature to properly provide an education for its youth."

The people of this state also have a strong interest in regulating various professions, including the teaching profession. "That the State through the legislature may provide for the licensure and regulation of professions * * * in which the public interest is very great, is not open to question." *Fowler* v *Chiropody Board*, 374 Mich 254, 256; 132 NW2d 82 (1965). To require the state to prove conclusively that certification of the teaching profession guarantees excellent performance would severely inhibit its legislative authority. "The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality." *Shaver*, *supra*, 294 NW2d at 900. In *Faith Baptist*, *supra*, 301 NW2d 571, 579, the Nebraska Supreme Court noted as follows:

"We are not suggesting as an absolute that every person who has earned a baccalaureate degree in teaching is going to become a good teacher, any more than one who has obtained the appropriate training and education will become a good engineer, lawyer, beauty operator, welder, or pipefitter. However, we think it cannot fairly be disputed that such a requirement is neither arbitrary nor unreasonable; additionally, we believe it is also a reliable indicator of the probability of success in that particular field.

> We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people."

The court below concluded that the curriculum standards do not further the state's interest in education because they do not mandate statewide uniformity. The judge cited no authority for the proposition that uniformity is essential in order for a state regulation to pass constitutional muster. Michigan has followed a long tradition of local administration of public schools. "The policy of the State has been to retain control of the school system, *to be administered throughout the State under State laws by local school agencies organized with plenary powers to carry out the delegated functions given it by the legislature.*" *Lansing District* v *State Board of Education*, 367 Mich 591, 595; 116 NW2d 866 (1962). (Emphasis added.) "The Michigan educational structure * * * in common with most States, provides for a large measure of local control." *Milliken* v *Bradley*, 418 US 717, 742; 94 S Ct 3112; 41 L Ed 2d 1069, 1089 (1974). The state holds a strong interest in local participation in educational policy making, as it "permits the structuring of school programs to fit local needs", and encourages competition for excellence in education. *Id.*

Perhaps more importantly, the record reveals that plaintiffs would object to the state's certification and curriculum requirements even if they were shown to be universally effective in the one instance, and uniform as to every detail in the other. Their First Amendment claim is based on a complete rejection of state authority, not on the failure or narrowness of application of any particular state policy. Like those in question in *Shaver, supra*, the Michigan standard "may be imperfect, [but] without the regulations the state would have no reasonable assurance that its recognized interest in providing an education for its youth is being protected." 294 NW2d at 900.

Indeed, we believe that this interest is not only "recognized" but it is of sufficient urgency to be classified as "compelling" within the constitutional standard that any intrusion upon religious practice can only be justified if there is a "compelling state interest." Plaintiffs have urged that there is no compelling state interest in any of the specific state requirements involved in this case but this argument misplaces the emphasis. The issue is not whether there is a compelling state interest in any individual regulation but whether the individual regulations are reasonable means to give effect to a broader compelling state interest — in this case the provision of an education to all children. For the reasons stated herein, we believe the regulations are a reasonable exercise of state authority in the field of education.

II. THE CURRICULUM AND CERTIFICATION REQUIREMENTS DO NOT VIOLATE THE FIRST AMENDMENT ESTABLISHMENT CLAUSE BECAUSE THEY DO NOT NECESSITATE EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION.

The United States Supreme Court has applied a three-part test to determine whether a law violates the Establishment Clause of the First Amendment. "[A] statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, *and must not foster an excessive government entanglement with religion.*" *Wolman* v *Walter*, 433 US 229, 236; 97 S Ct 2593; 53 L Ed 2d 714, 725 (1977). (Citations omitted; emphasis added.) The issue here arises from the trial court's terse conclusion that the teacher certification requirement and curriculum regulations violate the third portion of this test.

The Court stated as follows in *Lemon, supra*, 29 L Ed 2d 745, 757:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid the State provides, and the resulting relationship between the government and the religious authority."[2]

In a concurring opinion in *Walz* v *Tax Commission*, 397 US 664, 695; 90 S Ct 1409; 25 L Ed 2d 697, 717 (1970), Justice Harlan noted the dangers arising from "government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning" of religious institutions.

It does not however follow that the state must abstain totally from regulatory contact with religious schools. "Some relationship between governmental and religious organizations is inevitable.' *Lemon*, *supra*, 29 L Ed 2d 745, 756. "The test is inescapably one of degree." *Walz*, *supra*, 25 L Ed 2d 697, 704. "The State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction * * * and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman*, *supra*, 53 L Ed 2d 714, 727. (Citations omitted.)

Plaintiffs argue that the requirements necessarily imply a substantial state scrutiny and investigation of their schools. To the contrary, the state's curriculum review consists of a mere comparison of the courses offered in the schools to those in the neighboring public schools. Plaintiffs met these requirements with little difficulty.

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2. Here we may substitute for this language the following:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions that are burdened, the nature of the burden which the state imposes, and the resulting relationship between the government and the religious authority.

There is no continuous state involvement in the operation of the schools but only "occasional communciation between the two entities." *Citizens to Advance Public Education* v *State Superintendent*, 65 Mich App 168, 179; 237 NW2d 232 (1975), *lv den* 397 Mich 854 (1976).

In *New Jersey State Board of Higher Education*, *supra*, 448 A2d 988, the New Jersey Supreme Court rejected the argument that state licensure of degree programs in parochial institutions of higher learning violates the First Amendment. "The Establishment Clause permits minor, unobtrusive state supervision of religiously oriented schools." *Id.*, 997. See also, *Attorney General* v *Bailey*, 386 Mass 367; 436 NE2d 139 (1982).

Regulation of plaintiffs' schools does not entail "a comprehensive, discriminating, and continuing state surveillance." *Lemon*, *supra*, 29 L Ed 2d at 759. Accordingly, the teacher certification and curriculum requirements involve permissible state contacts with the religious schools.

III. THE USE OF STATISTICAL DATA

The trial court ordered that the information gathered from the schools pursuant to MCL 388.555, *supra* "be used for statistical and comparison purposes only." Since the court erred in concluding that the state's regulatory scheme violated the First Amendment, there remains no justification for restricting the state in its use of the information. Therefore, the state may use statistical data gathered from plaintiffs in the same manner that such data is used vis-a-vis the public schools.

IV. THE STATE'S REGULATORY SCHEME IS NOT UNCONSTITUTIONALLY VAGUE.

Plaintiffs contend that the curriculum requirements are unconstitutionally vague because they lack specificity as to what courses must be offered. As noted above, the state has largely delegated this task to local school

authorities. MCL 380.1282, *supra*. In order to win state approval for purposes of the compulsory attendance law, a nonpublic school must offer courses "comparable" to those offered by the public schools in the district within which the nonpublic school is located. MCL 380.1561(3)(A), *supra*.

The vagueness doctrine "helps to ensure that individuals are not held responsible by the state for conduct they could not reasonably understand to be proscribed." *State Board of Dentistry* v *Blumer*, 78 Mich App 679, 683; 261 NW2d 186 (1977). The record reveals no difficulty in ascertaining the course of study in the public school district wherein plaintiffs' schools are located. The state has already determined that plaintiffs' school meet the requirements. Moreover, given the public's interest in local participation in formulation of educational programs, the standards are as reasonably precise as the subject matter permits. *Dept of Natural Resources* v *Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976). Accord, *Bangor Baptist Church* v *State of Maine*, 549 F Supp 1208, 1227-1228 (Dist of Maine, 1982); *Scoma* v *Chicago Board of Education*, 391 F Supp 452, 462-463 (ND Ill, 1974).

In any event, the requirements imposed upon plaintiffs' schools are no more vague than those imposed upon the public schools and, as we have indicated elsewhere herein, plaintiffs' objections are to any curriculum requirements at all. No matter how specific the curriculum requirements might be, plaintiffs would object to being subjected to them.

V. THE DANGER OF FUTURE ABUSES BY THE STATE

Plaintiffs are concerned with the potential for abuses by local school boards but are unable to point to any that have actually occurred. Plaintiffs have the burden of showing an actual infringement of their rights. *Hough*,

supra. The statutory scheme should not be invalidated merely because it may be susceptible to an unconstitutional interpretation. *Sheldon College, supra,* 448 A2d 988, 998.

"A state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts." *Erznoznik* v *City of Jacksonville*, 422 US 205, 216; 95 S Ct 2268; 45 L Ed 2d 125, 135 (1975). "Wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Traverse City School District* v *Attorney General*, 384 Mich 390, 406; 185 NW2d 9 (1971); *Royal Auto Parts* v *Michigan*, 118 Mich App 284, 289; 324 NW2d 607 (1982). "It is only when manifest assumpton of authority and clear incompatibility between the constitution and law appears, that the judicial power can refuse to execute it." *People* v *Collins*, 3 Mich 343, 349 (1854).

If those who have authority to administer the state's education requirements do so in an arbitrary or capricious manner or in a manner which limits plaintiffs' rights to teach their religious doctrines, plaintiffs would be free to challenge the propriety of such action. However, the mere existence of the right to impose teacher certification and curriculum requirements is not itself, an unconstitutional intrusion upon religious liberty.[3]

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3. Lest there be any misunderstanding, we are not saying that teacher certification and curriculum requirements are a necessary form of regulation of non-public schools. The Legislature might very well choose other means to assure conformity to minimum standards. We are merely saying that the particular form of regulation chosen by the Legislature is constitutionally permissible. Having so ruled, our inquiry can go no further since it is not our function to pass upon the wisdom of legislation once we decide that it conforms to the Constitution.

CONCLUSION

The judgment of the Ingham County Circuit Court of January 12, 1983 is reversed as provided herein. We specifically hold:

I. That the portion of 1921 PA 302, §1, requiring the courses of study and qualifications of teachers in all private, denominational or parochial schools to "be of the same standard as provided by the general school laws of the state" is constitutional as applied to the plaintiffs;

II. That 1921 PA 302, §3, requiring all teachers employed in a private, denominational or parochial school with secular instructional responsibilities to hold a valid Michigan teacher's certificate is constitutional as applied to the plaintiffs;

III. That the injunction restraining defendants from enforcing, as to plaintiffs, 1921 PA 302, §3 and that portion of 1921 PA 302, §1 which the trial court found to be unconstitutional in its opinion of Decemeber 29, 1982 is hereby vacated;

IV. That the information gained from plaintiffs under 1921 PA 302, §5 may be used for the same purposes that such information is used with regard to the public schools and that such information may be used for purposes of approval of the plaintiff schools;

V. That defendants' prayer for injunctive relief requiring the plaintiff churches and schools to submit for examination, through the use of the non-public school membership report or by personal examination, the records of enrollment of pupils attending their schools and the qualifications of their teachers teaching at such schools shall be granted.

This case is remanded to the trial court for issuance of an injunctive order consistent with this opinion.

No costs or attorney fees, a public question being involved.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ John H. Shepherd

Appendix C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

SHERIDAN ROAD BAPTIST CHURCH; FIRST BAPTIST CHURCH BRIDGEPORT; REVEREND GERALD SOMBERO; REVEREND RENE B. OUELLETTE; RONALD MUNSON and JANICE MUNSON, his wife; WILLIAM L. SWAIN and SHARON SWAIN, his wife; and MRS. SUSANNE KWAITKOWSKI,

Plaintiffs,

vs

OPINION AND ORDER
Docket No. 80-26205-AZ

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; and PHILLIP E. RUNKEL, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants.

At a session of said Court held in the Circuit Courtrooms, City of Lansing, County of Ingham, State of Michigan, on the 29th day of December, A.D., 1982.

PRESENT: HONORABLE RAY C. HOTCHKISS, *Circuit Judge*

Plaintiffs, Sheridan Road Baptist Church and First Baptist Church of Bridgeport, are fundamentalist Baptist churches located in the State of Michigan. Sheridan Road Baptist Church operates the Sheridan Road Christian School; First Baptist Church of Bridgeport operated

the Bridgeport Baptist Academy. The remaining plaintiffs are pastors, members and teachers involved with one of the other of Plaintiff churches.

In July of 1980, Defendant, Michigan Department of Education, filed a complaint with the Superintendent of Public Instruction seeking suspension of the operation of Sheridan Road Christian School and the Bridgeport Baptist Academy. The complaint alleged that the schools failed to comply with the requirements of 1921 P.A. 302, § 5; MCLA 388.555; MSA 15.1925.

On December 6, 1980, plaintiffs filed the present action seeking declaratory and injunctive relief. Plaintiffs challenge the constitutionality of 1921 P.A. 302 (hereafter referred to as "the act") and allege that said act is contrary to the First and Fourteenth Amendments to the Constitution of the United States and Article I, Section 4, and Article VII, Section 1, of the Constitution of the State of Michigan.

I

The purpose of 1921 P.A. 302 is clearly stated in the preamble to that act. It provides:

> "AN ACT to provide for the supervision of private, denominational and parochial schools; to provide the manner of securing funds in payment of the expense of such supervision; to provide the qualifications of the teachers in such schools; and to provide for the endorsement of the provisions hereof."

Under Section 1 of the act, the superintendent of public instruction is given supervision over all private, denominational and parochial schools. This section further provides that the sanitary conditions and the courses of study in religious schools must be of the same standard as provided by the public schools. Under Section 3 of the act, all teachers employed by non public schools must be

certificated and must submit to an examination to obtain a certificate.

Section 4 of the act provides for hearings on violations of the act and provides sanctions including the closing of the school and forcing students to attend public school. Section 5 provides for investigation and examination of records of non public schools by the superintendent of public education to determine whether that school is in compliance with the act. This section also provides that refusal to allow an investigation or examination of records is sufficient cause to suspend the operation of the school.

Plaintiffs assert that the above act is violative of their constitutional rights to due process of law, to freely exercise their religious beliefs, and constitutes an establishment of religion by the State of Michigan. Plaintiffs further assert that the act is violative of their constitutional rights to freedom of religion and freedom to educate their children in a religious setting as provided for by the constitution of the State of Michigan.

II

Plaintiffs are members of the Fundamentalist Christian movement which has at its base the acceptance of Jesus Christ as a personal savior and strict adherence to the teachings of the Bible. The fundamentalist movement believes the church to be not only a place of worship but place for instruction of the young. (T III pp 26,27). An outgrowth of this belief is the belief that the school is an extension of the church or a ministry of the church, (T III p 28), and that all subjects taught in the school must be taught from a religious point of view. (T I pp 24-27; T II(b) p 203). All textbooks used in the schools are permeated with religious and biblical doctrine. (T I p 103).

Plaintiffs believe that only teachers who are themselves fundamentalists and of good moral character are

capable of instructing their children. (T II(b), pp 104,124). The pastors of both the Sheridan Road Baptist Church and the First Baptist Church of Bridgeport stated that they consider it a sin and a violation of church tenets for members of the church to send their children to public school. (T I pp 78,79; T II(b) p 212).

As fundamentalists, plaintiffs object to state regulation of their schools which they consider a mission ordained by God. They further object to the certification of their teachers, believing that the course of study required to obtain a certificate teaches a humanistic rather than a religious approach to education. Plaintiffs believe that such a humanistic approach is in direct opposition to the beliefs of their church. (T I p 41). Plaintiffs also see state certification of teachers as state licensure of church staff. Teachers employed by the schools object to seeking a state teachers' certificate on religious grounds. (T I p 41; T III p 66).

This Court is of the opinion that the religious beliefs of the plaintiffs are sincere and that the education of their children in schools which conform to their religious beliefs is an integral part of the churches' religious mission. This Court is further of the opinion that the regulations imposed on the schools by 1921 P.A. 302 interferes with the practice of plaintiffs' legitimate religious beliefs.

III

Freedom of worship is among the fundamental rights which are protected by the Fourteenth Amendment of the Constitution from infringement by the state. *Chaplinsky v New Hampshire*, 315 US 568, 62 S Ct 766, 86 L Ed 1031. The basic purpose of the free exercise and establishment clause of the Fourteenth Amendment is to see that no religion is favored, sponsored, commanded, or inhibited. *Committee for Public Education & Religious Liberty v Nyquist*, 413 US 756, 935 S Ct 2955, 37

L Ed 2d 948. Only the highest state interests, and those not otherwise served, may overbalance the legitimate claims to the free exercise of religion. *Sherbert v Verner*, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965. *Wisconsin v Yoder*, 406 US 205, 92 S Ct 1526, 32 L Ed 2nd 15.

In order for a state statute to be permissible under the religion clauses of the Fourteenth Amendment, it must 1) have a secular legislative purpose, 2) its principle or primary effect must neither advance nor inhibit religion, and 3) it must not foster excessive government entanglement with religion. *Lemon v Kurtzman*, 403 US 602, 91 S Ct. 2105, 29 L Ed 2d 745. *Stone v Graham*, 449 US 39, 101 S Ct 192, 66 L Ed 2d 199.

The State of Michigan's interest in universal education can only be classified as a state interest of the highest order. To implement the responsibility for education, it is necessary that the state have power to impose reasonable regulations. However, even the state's interest in education is not above the balancing process when it impinges on fundamental rights like the free exercise of religion.

IV

Section 3 of the act requires that all teachers employed by non public schools must be certified by the State of Michigan. Under MCLA 380.1531, the State Board of Education is responsible for determining the requirement for teacher certification. One requirement is that a candidate must hold a degree from a college or university with an approved teacher training program. Another requirement is that a candidate must complete a certain number of hours as a student teacher "under the guidance of an experienced teacher."

The purpose of teacher certification in Michigan is to insure a minimal level of qualification for teachers. (T IV

p 65), and to provide some minumum standards to address things a teacher ought to know in order to avoid harm or detriment to children. (T II(a) p 28).

Defendants' expert witness, Dr. Judith E. Lanier, stated that without teacher certification, there would be no safeguard or mechanism to represent the State's interest in the education of children by qualified instructors. (T II(a) p 27). However, Dr. Lanier admitted that she was aware of no specific research linking teacher certification with better teachers. (T II(a) p 41). Dr. Lanier also stated that she did not believe Michigan teacher certification program has resulted in overall success in performance by Michigan students. (T II(a) p 56).

Dr. Donald Erickson, an expert in the field of education, testified that there is a distinct lack of consensus on the method to be used to train teachers. (T V p 108). Dr. Erickson further testified that the factors that make certain teachers more effective than others are unknown. (T V p 117).

Dr. Erickson stated that schools that employ only certified teachers are generally less effective when effectiveness is measured by student achievement. (T V pp 106, 107). He criticized Michigan's teacher education system which he felt imposed certain methods of teaching at the expense of others. (T V pp 133, 136). Dr. Erickson further testified that he believed teacher certification to be one of the weakest steps to guaranteeing educational quality. (T V p 103).

Another expert in the field of education, Dr. Russell D. Kirk, testified that the requirements for teacher certification in Michigan are excessive in number and that the requirements for teacher training institutions are too restrictive. (T IV pp 17, 19, 20). Dr. Kirk was of the opinion that the certification requirement produces mediocrity in the teaching profession and does not improve the quality of teaching in this state. (T IV pp 17, 22). Dr. Kirk was further opined that teacher certification was not the

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best available means to ensure quality of teaching in the state. (T IV p 22). Dr. Kirk further stated:

> "... In fact, as teacher certification stands in this state and many other states, teacher certification may be a positive obstacle to acquiring a mastery of subject. The more courses, the better courses, the fewer courses in so-called substantive disciplines. It is not something, however, in the classroom that one acquires knowledge of the subject. Much is acquired by private reading and in fact in the course of teaching itself. It's particularly true of the social sciences. I think the majority of social science teachers in every state are under prepared in social science instruction. They don't know enough history and government, sociology and similar subjects when they start teaching." (T IV p 51).

Defendant contends that the need to insure minimum standards for teaching in private schools constitutes a compelling state interest and that teacher certification is a reasonable means of assuring that state interest. The overwhelming weight of evidence presented, however, shows that teacher certification does not insure teacher competency and may even inhibit teacher competency.

This Court is of the opinion that 1921 P.A. 302, § 3, interferes with plaintiffs' constitutional right to freely exercise their religious beliefs. Defendants have failed to show that teacher certification is a reasonable or effective means to carry out a legitimate state purpose. Further, this court is of the opinion that teacher certification causes excessive government entanglement with religion.

This Court is of the opinion that 1921 P.A. 302, § 3, MCLA, is violative of the First Amendment to the United States Constitution, and is, therefore, void and without effect.

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V

Section I of the act, MCLA 388.551; MSA 15.1921, provides in part:

> ". . . the sanitary conditions of such schools, the courses of study therein, and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state."

Plaintiffs object to the requirement that the courses of study must be of the same standard as the public school. The "general school laws" of the state do not specify any particular courses, but allow the local school boards to determine the courses of study in their districts. See MCLA 380.1282, MSA 15.3583.

State official, Paul DeRose, testified that the Department of Education makes a judgment as to what is comparable in terms of curriculum offered by non public schools. (T V p 70). Mr. DeRose further testified that non public schools must be comparable to public schools in the same district but may not be comparable to public schools located in a different school district. (T V pp 73, 74). Mr. DeRose was unaware of any guidelines for local school district officials in evaluating non public schools. (T V p 74).

Jack R. Newton, Superintendent of the Bridgeport-Spalding Community School District, testified that it was within his power to evaluate the curriculum of non public schools to ascertain if that curriculum was comparable to the public schools in that area. Mr. Newton stated that a non public school must teach "appropriate" courses and that these courses must be of the same quality as those taught in the public schools within the district. (T IV pp 67, 69, 70, 72, 73). Mr. Newton further stated that the determination as to whether a non public school was comparable rested with the administrative staff of the school district. (T IV pp 74, 75).

Mr. Newton admitted concern with the loss of $2,000 in State Aid for every student who leaves the public school and enrolls in area non public schools. (T IV p 64).

This Court fails to see a compelling state interest in requiring non public schools to be "of the same standard" as public schools in the same school district. Such a scheme does not insure uniformity in the quality of education in the state because the school districts throughout the state are not required to be comparable. Further, such a scheme does not insure even a minimum degree of quality in education; it merely requires that non public schools be as good as, or as bad as, the public schools in the district.

The state leaves the responsibility for comparison of non public and public schools with local school district officials who are given little or no guidelines and subjectively asked to decide if the courses of study in non public schools are of the same standard as the public schools. These local officials are ill prepared to determine the substance of Act 302 and the corresponding provisions in the Compulsory Attendance Act. In addition, school districts have vested interest in maintaining enrollment in the public schools since each student lost means substantial loss of revenue for that district.

This Court is of the opinion that § 1 of 1921 P.A. 302 causes excessive government entanglement with religion and does not forward any compelling state interest. It is, therefore, the opinion of this court that § 1 of 1921 P.A. 302 is unconstitutional.

VI

Section 5 of the Act, MCLA 388.555; MSA 15.1925, provides for investigation of the records of non public schools by the superintendent of public education to determine whether a school is in compliance with the act. As noted above, a state's interest in universal education

is a state interest of the highest order. In order to advance this state purpose, it is necessary for the state to have access to the records of non public schools. This Court is of the opinion that this is a necessary and permissible contact between government and religion under the First Amendment to the United States Constitution. See *Lemon* v *Kurtzman*, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745. However, information regarding teacher certification and courses of study gained pursuant to such an investigation may be used for statistical and comparison purposes only.

Section 4 of the Act, MCLA 388.554, MSA 15.1924, provides for hearings on violations of the act and sanctions for violations of the act. This Court is of the opinion that such hearings and sanctions are necessary to enforce the remaining constitution portions of 1921 P.A. 302 and to protect the state's interest in the health, safety and education of the children of the state.

VII

If different sections of a statute are independent of each other, the unconstitutional section may be disregarded and the remaining sections may be given full effect. *Connolly* v *Union Sewer Pipe Co.*, 184 US 540; 22 S Ct 431, 46 L Ed 679. This Court is of the opinion that Section 3 of the act and that portion of Section 1 that requires the course of study to be of the same standard as the public school are unconstitutional. This Court is further of the opinion that the remaining provisions of the act are independent of the unconstitutional portions and shall remain in full effect.

NOW, THEREFORE;

IT IS ORDERED that an injunction issue prohibiting Defendant from enforcing 1921 P.A. 302 § 3 and that portion of 1921 P.A. 302 § 1 which this Court found to be unconstitutional.

RAY C. HOTCHKISS,
Circuit Judge

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

SHERIDAN ROAD BAPTIST CHURCH; FIRST BAPTIST CHURCH BRIDGEPORT; REVEREND GERALD SOMERO; REVEREND RENE B. OUELLETTE; RONALD MUNSON and JANICE MUNSON, his wife; WILLIAM L. SWAIN and SHARON SWAIN, his wife; and MRS. SUSANNE KWAITKOWSKI,

Plaintiffs,

vs Docket No. 80-26205-AZ

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; and PHILLIP E. RUNKEL, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants.

JUDGMENT

At a session of said Court, held in the
Town Center, City of Lansing,
County of Ingham, State of Michigan,
on the 12 day of January, 1983.

PRESENT: HONORABLE CAROLYN STELL *Circuit Judge*

This cause for injunctive and declaratory relief having come on for trial on the merits, and the court having considered the pleadings, testimony of witnesses, documentary evidence, pre-trial briefs, post-trial briefs with proposed findings of fact and conclusions of law, and the

arguments of counsel, and having filed a written opinion, dated December 29, 1982, which is incorporated herein verbatim by reference, and the Court being fully advised in the premises;

IT IS HEREBY DECLARED AND ADJUDGED that the portion of 1921 PA 302, § 1, requiring the courses of study and qualifications of teachers in all private, denominational or parochial schools to "be of the same standard as provided by the general school laws of the state" is unconstitutional as applied to the plaintiffs.

IT IS FURTHER DECLARED AND ADJUDGED that 1921 PA 302, § 3, requiring all teachers employed in a private, denominational or parochial school with secular instructional responsibilities to hold a valid Michigan teacher's certificate is unconstitutional as applied to the plaintiffs.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants are enjoined from enforcing, as to plaintiffs, 1921 PA 302, § 3 and that portion of 1921 PA 302, § 1 which this Court found to be unconstitutional in its opinion of December 29, 1982.

IT IS FURTHER DECLARED AND ADJUDGED that 1921 PA 302, § 5, requiring all private, denominational or parochial schools to submit for examination the records of enrollment of pupils and the certification of their teachers is constitutional as applied to the plaintiffs, provided the information gained thereby may be used for statistical and comparison purposes only, and not for purposes of approval of said schools.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs are enjoined to submit for examination through the use of the nonpublic school membership report, or, at the option of the school, by personal examination the records of enrollment of pupils attending their schools and the certification of their teachers teaching at their schools, provided however that information regarding teacher certification provided pursuant to such an

examination may be used for statistical and comparison purposes only.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk shall tax costs pursuant to GCR 1963, 526 and that the parties shall submit a bill of costs to the Clerk within 30 days from the date hereof.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs may submit a motion seeking attorney fees under 42 USC § 1988 within 30 days from the date hereof.

CAROLYN STELL

Carolyn Stell *Circuit Judge*

Stipulated to:

/s/

MICHAEL E. THOMAS

/s/

RICHARD P. GARTNER

APPENDIX E

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 30th day of December in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

Rehearing No. 178

SHERIDAN ROAD BAPTIST CHURCH; FIRST BAPTIST CHURCH BRIDGEPORT; REVEREND GERALD SOMERO; REVEREND RENE B. OUELLETTE; WILLIAM L. SWAIN AND SHARON SWAIN, his wife; AND MRS. SUSANNE KWAITKOWSKI,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; AND PHILLIP E. RUNKEL, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

SC 73665
CoA 69050
LC 80-26205-AZ

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

STATE OF MICHIGAN—SS.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 30th day of December in the year of our Lord one thousand nine hundred and eighty-six.

SEAL

/s/ CORBIN R. DAVIS

Clerk.

APPENDIX F

1921 P.A. 302

M.C.L. § 388.551 Private, denominational and parochial schools; supervision by superintendent of public instruction; assistants, compensation, removal; intent of act.

Sec. 1. The superintendent of public instruction is hereby given supervision of all the private, denominational and parochial schools of this state in such matters and manner as is hereinafter provided. He shall employ such assistants and employes as may be necessary to comply with the provisions hereof and fix the compensation thereof; the number of assistants and employes and the compensation payable thereto being subject to the approval of the state administrative board. Such salaries and expenses shall be paid by the treasurer of the state of Michigan upon the warrant of the auditor general from the fund as herein designated, at such time and in such manner as other state officers and employes are paid. The superintendent of public instruction shall have the authority to remove any appointee under this act at any time that he may deem such removal advisable. It is the intent of this act that the sanitary conditions of such schools, the courses of study therein, and the qualifications of the teachers thereof shall be of the same standard as provided by the general school laws of the state. (M.S.A. § 15.1921.)

M.C.L. § 388.552 Private, denominational or parochial schools; definition.

Sec. 2. A private, denominational or parochial school within the meaning of this act shall be any school other than a public school giving instruction to children below the age of 16 years in the first 8 grades as provided for the public schools of the state, such school not being

under the exclusive supervision and control of the officials having charge of the public schools of the state. (M.S.A. § 15.1922.)

M.C.L. § 388.553 Private, denominational and parochial schools; teachers, qualifications, examinations.

Sec. 3. No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state: Provided, however, That any person who shall have taught in any elementary school or schools of the standard specified in this act for a period of 10 years or more preceding the passage of this act, shall, upon filing proof of service with the superintendent of public instruction, be entitled to a certificate by said superintendent of public instruction in such form as he shall prescribe, to teach in any of the said schools within the state: Provided further, That teaching in such schools shall be equivalent to teaching in the public schools for all purposes in obtaining a certificate: Provided further, That the teachers affected by this act may take any examination as now provided by law and that the superintendent of public instruction may direct such other examinations at such time and place as he may see fit. In all such examinations 2 sets of questions shall be prepared in subjects ordinarily written on Saturday, 1 of which sets shall be available for use on Wednesday by applicants who observe Saturday as their Sabbath: Provided further, That any certificate issued under or by virtue of this act shall be valid in any county in this state for the purpose of teaching in the schools operated under this act; Provided further, That any person holding a certificate issued by the authorities of any recognized or accredited normal school, college or university of this or

other state shall be entitled to certification as now provided by law: Provided, however, That teachers employed in such private, denominational or parochial schools when this act takes effect shall have until September first, 1925, to obtain a legal certificate as herein provided. (M.S.A. § 15.1923.)

M.C.L. § 388.554 Violation of act; hearing, closing of school, compulsory attendance.

Sec. 4. In event of any violation of this act the superintendent of public instruction shall serve the person, persons, corporation, association or other agencies who operate, maintain and conduct a private, denominational or parochial school within the meaning of this act with a notice, time and place of hearing, such hearing to take place within 15 days after the date of said notice and at a place located in or conveniently near the county where such violation took place, accompanied by a copy of the complaint stating the substance of said violation: Provided, That no person shall be called to attend any such hearing on any day observed by him as the Sabbath. If at such hearing the superintendent of public instruction shall find that the violation complained of has been established he shall then serve said person, persons, corporation, association or other agencies with an order to comply with the requirements of this act found to have been violated within a reasonable time not to exceed 60 days from the date of such order: Provided, That in the event that such order refers to sanitary conditions that the said person, persons, corporation, association or other agencies shall have 6 months in which to remedy the defect. If the order of the superintendent of public instruction as specified in said notice shall not have been obeyed within the time specified herein said superintendent of public instruction may close said school and prohibit the said person, persons, corporation, association or other agencies operating or maintaining such private,

denominational or parochial school from maintaining said school or from exercising any of the functions hereunder until said order of the superintendent of public instruction has been complied with. The children attending a private, denominational or parochial school refusing to comply with the requirements hereof after proceedings herein set forth shall be compelled to attend the public schools or approved private, denominational or parochial school under the provisions of the compulsory education act, the same being Act No. 200 of the Public Acts of 1905, as amended. And it shall be the duty of the person or persons having charge of the enforcement of the said compulsory education act, upon notice from the superintendent of public instruction that said private, denominational or parochial school has not complied with the provisions hereof, to compel the attendance of the children of said school or schools at the public schools or approved private, denominational or parochial school. (M.S.A. § 15.1924.)

M.C.L. § 388.555 School investigation and examination; failure to permit, cause for suspension.

Sec. 5. The superintendent of public instruction by himself, his assistants, or any duly authorized agent, shall have authority at any time to investigate and examine into the conditions of any school operating under this act as to the matters hereinbefore set forth and it shall be the duty of such school to admit such superintendent, his assistants or authorized agents and to submit for examination its sanitary condition, the records of enrollment of pupils, its courses of studies as set forth in section 1 of this act and the qualifications of its teachers. Any refusal to comply with provisions herein on the part of such school or teacher shall be considered sufficient cause to suspend the operation of said school after proceedings taken as stated in section 4 of this act. (M.S.A. § 15.1925.)

M.C.L. § 338.556

(Repealed by Pub Acts 1945, No. 267, imd eff May 25.) (MS.A. 15.1926.)

M.C.L. § 388.557 Act construed as to distribution of primary school fund.

Sec. 7. Nothing in this act contained shall be construed so as to permit any parochial, denominational, or private school to participate in the distribution of the primary school fund. (M.S.A. § 15.1927.)

M.C.L. § 388.558 Classes for physically or mentally handicapped children.

Sec. 8. Any private, denominational or parochial school which maintains classes for the instruction of children below the age of 16 years who are physically or mentally handicapped or who are socially maladjusted shall be required to meet the standards prescribed for instruction of handicapped children in the public schools under the provisions of section 2 of chapter 19 of part 2 of Act No. 319 of the Public Acts of 1927, as amended, in addition to standards required of private, denominational and parochial schools under sections 1 and 3 of this act. (M.S.A. § 15.1928.)

APPENDIX G

1976 P.A. 451

M.C.L. §380.1561 Compulsory education.

Sec. 1561. (1) Except as provided in subsections (2) and (3), every parent, guardian, or other person in this state having control and charge of a child from the age of 6 to the child's sixteenth birthday, shall send that child to the public schools during the entire school year. The child's attendance shall be continuous and consecutive for the school year fixed by the school district in which the child is enrolled. In a school district which maintains school during the entire calendar year and in which the school year is divided into quarters, a child shall not be compelled to attend the public school more than 3 quarters in 1 calendar year, but a child shall not be absent for 2 consecutive quarters.

Dates for enrollment. (2) A child becoming 6 years of age before December 1 shall be enrolled on the first school day of the school year in which the child's sixth birthday occurs. A child becoming 6 years of age on or after December 1 shall be enrolled on the first school day of the school year following the school year in which the child's sixth birthday occurs.

Children not required to attend school. (3) A child shall not be required to attend the public schools in the following cases:

(a) A child who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located.

(b) A child who is regularly employed as a page or messenger in either house of the legislature during the period of the employment.

(c) A child under 9 years of age who does not reside within 2½ miles by the nearest traveled road of a public school. If transportation is furnished for pupils in the school district of the child's residence, this exemption does not apply.

(d) A child from the age of 12 to the child's fourteenth birthday while in attendance at confirmation classes conducted for a period of not to exceed 5 months in either of those years.

(e) A child who is regularly enrolled in the public schools while in attendance at religious instruction classes for not more than 2 class hours per week, off public school property during public school hours, upon written request of the parent, guardian, or person in loco parentis under rules promulgated by the state board. (M.S.A. §15.41561.)

APPENDIX H

MICHIGAN ADMINISTRATIVE CODE

TEACHER CERTIFICATION CODE

(By authority conferred on the state board of education by sections 10 and 15 of Act No. 287 of the Public Acts of 1964, sections 9 and 302 of Act No. 380 of the Public Acts of 1965, and section 33 of Act No. 306 of the Public Acts of 1969, being §§388.1010, 388.1015, 16.109, 16.402, and 24.233 of the Michigan Compiled Laws)

PART 1. GENERAL PROVISIONS

R 390.1101 Definitions.

Rule 1. As used in this code:

(a) "Elementary school" means a school which includes grades kindergarten to 9.

(b) "Secondary school" means a school which includes grades 7 to 12.

(c) "Sponsoring institution" means a higher education institution approved for teacher education by the state board and which is willing to make recommendations as to applicants for the several certificates provided for in this code.

(d) "State board" means the state board of education.

(e) "Substantive field" means courses in areas other than professional preparation courses in education or courses of content or methods related to the preparation of teachers.

(f) "Satisfactory college credit" means an average grade of "C" or its equivalent.

(g) "Certificate endorsement" means the extension of the grade level validity of an existing elementary or secondary certificate or the completion of a planned program in an area of specialization. The intent of the endorsement program is to permit a person with a secondary certificate to obtain an endorsement at a level other than secondary and to permit a person with an elementary certificate to obtain an endorsement in another area or level other than elementary.

(h) "Early childhood certificate endorsement" means an authorization to teach in any school program preceding or including kindergarten.

(i) "General elementary certificate endorsement" means an authorization to teach in grades kindergarten to 6.

(j) "Middle school certificate endorsement" means an authorization to teach in grades 5 to 9.

(k) "Secondary certificate endorsement" means an authorization to teach in grades 10 to 12.

R 390.1103 Successful teaching.

Rule 3. (1) The determination of 3 years of successful teaching specified in these rules shall be according to the following:

(a) Employment may be with 1 or more employers in a regular or substitute teaching capacity.

(b) Each period of employment shall be characterized as successful or unsuccessful by the employer.

(c) A year of employment is a minimum of 150 teaching days and may be either an academic or a calendar year, but not more than 1 year of employment can be earned during a calendar year.

(d) A day of employment is ½ or more of a teaching day, but not more than 1 day of employment can be earned during a calendar day.

(2) A teacher may appeal any decision under these rules through the recommending institution's appeal procedure and, failing relief from that source, to the state board of education.

R 390.1105 Persons required to hold certificates or permits.

Rule 5. (1) A person employed in an elementary or secondary school with instructional responsibilities shall hold a certificate, permit or vocational authorization valid for the positions to which he is assigned.

(2) A teacher aide, classroom assistant, secretary to instructional personnel or other paraprofessional person legally employed in a noninstructional capacity need not be certificated as a teacher.

(3) A student enrolled for student teaching or internship credit at an approved teacher education institution need not hold a teaching certificate but shall be certified by such a teacher education institution to the state board as enrolled for student teaching. The certificate shall include the initial and final dates of the assignment and the name of the school to which the student is assigned. Upon filing such certificate with the state board, persons assigned school duties by a board of education shall be considered as lawfully exercising such duties.

(4) A full-time teacher of a day school program reimbursed from vocational education funds (agriculture, business, homemaking, trade and industrial), shall meet the minimum qualifications for endorsement or authorization in the particular vocational education field as specified by the state board.

(5) A teacher in a reimbursed program in special education shall meet the minimum qualifications for certification when required by law in the particular special education field as specified by the state board.

(6) A previously issued certificate retains its original designation and validity. A permanent certificate continues as a permanent certificate.

R 390.1111 Equality of opportunity.

Rule 11. (1) The state board holds that segregation of students at any level in educational programs seriously interferes with the achievement of equal opportunity guarantees of this state and that segregated schools fail to provide maximum opportunity for the full development of human resources in a democratic society. Therefore, it directs each Michigan institution of higher education approved for the preparation of teachers to provide an opportunity for prospective teachers to: (a) understand the effect of discrimination on minority groups as well as on the majority; and (b) be educated in integrated teacher education programs so that in their professional careers they will be able to further achievement of the equal opportunity guarantees of this state.

(2) An applicant for provisional certification shall show an awareness that Michigan's constitution and laws guarantee the right to equal educational opportunity without discrimination because of race, religion, color, or national origin.

(3) Such an applicant holds an important responsibility for creating a climate for learning based upon the practice of, and an understanding of, equality of educational opportunity in its fullest sense.

(4) Such an applicant who is otherwise qualified shall not be denied the right to be certified by the state board, to receive training for the purpose of becoming a teacher or to engage in practice teaching in any school,

on the grounds he is blind, deaf, or physically handicapped in some other manner. A school district shall not refuse to engage a teacher on such grounds, if such a handicapped teacher is able to carry out the duties of the position for which he applies in the school district.

R 390.1115 Applications and credits.

Rule 15. (1) The application for a certificate or permit shall be directed to the state board of education, Lansing, Michigan, presented on a form supplied or approved by the state board.

(2) Credits toward certification shall be completed through an approved teacher education institution, or accepted in transfer by such an institution, and shall be acceptable toward requirements for a provisional teaching certificate and a bachelor's or higher degree. The state board reserves the right to determine the acceptability of credits presented for certification from approved teacher education institutions located in other states.

R 390.1117 Certificate restrictions and expiration

Rule 17. (1) A certificate and a permit have certain restrictions as to the nature of teaching for which the holder may be employed. The applicant and the employer shall be thoroughly familiar with the specific provisions regarding the validity of the several certificates.

(2) All certificates and permits expire on June 30 of the expiration year indicated on the certificate or permit.

PART 2. STATE PROVISIONAL CERTIFICATES

R 390.1121 General provisions.

Rule 21. (1) A qualified person shall complete an application for provisional certification within 5 years after certification requirements have been met.

(2) The requirements in this part of the code for the several certificates are minimum requirements.

(3) The provisions of this part are mandatory for all persons enrolled in teacher education institutions in this state after July 1, 1970.

R 390.1122 General education and substantive fields.

Rule 22. (1) An applicant for a provisional certificate shall demonstrate that he has an acquaintance with the substance, concepts, and methods of the principal areas of human knowledge, and skills essential to communication and inquiry in modern society. He shall present evidence that he has completed not less than 40 semester hours in a program of general or liberal education.

(2) An applicant shall present evidence of completion of a program providing for depth in any substantive field he proposes to teach. At the secondary level, such specialization is ordinarily initiated by completing a major in a specific field or in closely allied fields. At the elementary level, responsibility for introducing pupils to many areas of human knowledge or inquiry shall not deprive the prospective teacher of the opportunity to develop a degree of specialization in a particular substantive field. Therefore, the applicant shall present evidence that he has begun to master a substantive field and is able, because of his teaching skills, to stimulate students to seek more knowledge and understanding.

R 390.1123 Professional education.

Rule 23. (1) An applicant shall present evidence that he has completed 20 semester hours of theoretical and practical knowledge in the following fields:

(a) How human beings grow and how they learn.

(b) The structure, function and purposes of educational institutions in our society.

(c) The methods and materials of instruction appropriate to the elementary or secondary level.

(2) The applicant shall present evidence that he has participated under institutional supervision for a minimum of 6 semester hours (of the 20) in directed teaching at the level for which the certificate is granted.

R 390.1124 Scholastic averages and directed teaching.

Rule 24. (1) An applicant for an elementary or secondary provisional certificate shall have satisfactory college credits prior to assignment to directed teaching. An applicant, to qualify for a certificate, shall obtain satisfactory college credit in directed teaching. An applicant shall have satisfactory college credit in the required hours for each successive certificate.

(2) For certification purposes, a minimum of 30 clock hours of responsible classroom teaching and observation under the supervision of a sponsoring institution is equivalent to 1 semester hour of credit in directed teaching.

(3) The directed teaching requirement for the initial elementary or secondary provisional certificate may be waived in full or in part for an experienced teacher as follows:

(a) For an applicant with an earned master's degree or higher degree and 3 years of successful teaching experience at the appropriate level, together with a recommendation from the school superintendent and the sponsoring institution regarding the certificate, the complete requirement of 6 semester hours may be waived.

(b) For an applicant with less than an earned master's degree but with 5 years of successful teaching experience at the appropriate level, together with a recommendation from the school superintendent and the sponsoring institution regarding the certificate, the complete requirement of 6 semester hours may be waived.

R 390.1125 Degrees and recommendations.

Rule 25. (1) An applicant for a provisional certificate shall have been granted a bachelor's degree and shall be recommended by a Michigan college or university approved for teacher education by the state board. Degree requirements for an out-of-state applicant are determined by the out-of-state institution as described in R 390.1130.

(2) The sponsoring institution shall make recommendations concerning all certificates.

R 390.1126 State elementary provisional certificates.

Rule 26. (1) A state elementary provisional certificate may be issued to an applicant who presents evidence that he has completed 1 of the following requirements:

(a) A major of at least 30 semester hours or a group major of 36 semester hours, and a planned program of 20 semester hours in other substantive fields deemed appropriate to elementary education.

(b) Three minors of at least 20 semester hours each, 2 of which shall be in substantive fields which may include a group minor of 24 semester hours, and 1 of which may be a planned program of 20 semester hours in a combination of methods and content appropriate to elementary education.

(2) A state elementary provisional certificate is valid for teaching all subjects in grades kindergarten to 8, and in subject matter areas in grade 9 in which the applicant has completed a major or minor. It is valid for 6 years.

R 390.1127 State secondary provisional certificates.

Rule 27. (1) A state secondary provisional certificate may be issued to an applicant who presents evidence that he has completed the following requirements:

(a) A major of at least 30 semester hours or a group major of 36 semester hours.

(b) A minor of 20 semester hours or a group minor of 24 semester hours.

(2) A state secondary provisional certificate is valid for teaching all subjects in grades 7 and 8, and in subject matter areas in grades 9 to 12 in which the applicant has completed a major or minor. It is valid for 6 years.

R 390.1128 Additional majors and minors.

Rule 28. A person already certificated who wishes to qualify for a new major or minor may combine credit already earned with additional credit to bring the total up to the minimum for a major or a minor as specified in this code. The additional major or minor is to be recommended by a sponsoring institution in the same manner as the original provisional or permanent certificate and is to be recorded on a form certifying supplementary majors or minors.

R 390.1129 Certificate endorsements.

Rule 29. (1) The holder of a provisional or continuing certificate, elementary or secondary, may qualify for a certificate endorsement by presenting evidence that he has completed 1 of the following planned programs with

a minimum of 18 semester hours: early childhood, general elementary, middle school or areas appropriate to the secondary grades. When the planned program is completed following the issuance of the initial provisional state certificate, the person may apply the credit on the requirements for the continuing certificate.

(2) The holder of a provisional or continuing certificate, elementary or secondary, may qualify at a new certificate level, elementary or secondary, by presenting evidence that he has completed a minimum 12 semester hour planned program appropriate to the new certificate level. The applicant qualifying for the new certificate shall present evidence that he has a distribution of majors and minors appropriate to teaching at that new level. When directed teaching at the new level is required, the minimum of 2 years of successful teaching experience at the appropriate level as determined by the state board may be substituted for the requirement. Credit completed in qualifying at a new certificate level may be applied on the requirements for the continuing certificate.

(3) A Michigan institution approved for teacher education or an institution out of this state as authorized by R 390.1132(1)(c) may recommend the additional certificate endorsement.

R 390.1129a Procedures at expiration of provisional certificates.

Rule 29a. (1) To be qualified for teaching at expiration of an elementary or secondary provisional certificate, an applicant shall qualify within the provisional period for a continuing certificate. If the applicant does not so qualify, a 3-year renewal of the provisional certificate may be granted if the applicant presents evidence that he has completed 10 semester hours of credit since issuance of the provisional certificate or that he holds an earned master's or doctor's degree. A second 3-year renewal may be granted if the applicant presents evidence

that he has earned 18 semester hours after issuance of the provisional certificate in a planned course of study applicable toward requirements for a continuing certificate or that he holds an earned master's or doctor's degree.

(2) The sponsoring institution shall make recommendation concerning the certificate.

R 390.1130 Reciprocity

Rule 30. The state board may issue a provisional certificate to a person who has, or who is reported eligible for, a teaching certificate issued by the certificating authority of any other state in which requirements for certification are deemed equivalent to those in effect in this state. The state board may enter into written agreements with the states for the mutual acceptance of 1 or more types of teaching certificates issued by each state. The department of education shall publish and distribute annually a list of states with which reciprocity agreements are signed, or whose certificates are accepted in such manner.

PART 3. STATE CONTINUING CERTIFICATES

R 390.1131 Rescinded.

R 390.1132 State elementary and secondary continuing certificates.

Rule 32. (1) A state elementary or secondary continuing certificate may be issued to an applicant who presents evidence that he has completed the following requirements:

(a) He has taught successfully for 3 years according to the validity of his provisional certificate and since the issuance of the provisional certificate,

as determined by the state board upon recommendation of the sponsoring institution and the local school district.

(b) He has earned 18 semester hours after the issuance of the state provisional certificate in a planned course of study. This advanced course of study is applicable to the applicant's professional development as determined by the state board upon recommendation of the sponsoring institution and, if appropriate, the local school district. A person with an earned master's or higher degree is not required to complete the 18 semester hour planned program.

(c) A continuing certificate may be recommended by a teacher education institution out of this state accredited by a national teacher accreditation agency approved by the state board provided that credits comprising a planned course of study are applicable toward a master's or higher degree at the institution.

(2) This rule is mandatory for all persons seeking certification after July 1, 1976.

R 390.1133 State elementary and secondary 30-hour continuing certificates.

Rule 33. (1) A state elementary or secondary continuing certificate is not required but is available to the teacher who qualifies and requests it.

(2) This certificate may be issued to an applicant who presents evidence that he has completed the following requirements:

(a) He has taught successfully for 3 years, under the terms of his provisional, continuing or permanent certificate as determined by the state board upon recommendation of the sponsoring institution and the local school district.

(b) Thirty semester hours in a planned course of study beyond the bachelor's degree or that he holds a master's degree. This advanced course of study is applicable to the applicant's professional development and shall consist of a planned program contributing specifically to his professional improvement as determined by the state board upon recommendation of the sponsoring institution.

(c) When recommendation for this certificate is made by an institution which is located out of this state and accredited by a national teacher accreditation agency approved by the state board, the credits comprising a planned course of study shall be applicable on a master's or higher degree at the institution.

R 390.1134 Validity.

Rule 34. (1) A permanent or continuing certificate or full vocational authorization retains its validity providing the holder is employed in an educational capacity for a minimum of 100 days in any given 5-year period.

(2) A permanent or continuing certificate or full vocational authorization is suspended automatically if the holder is not employed in an educational capacity for the minimum of 100 days in the 5-year period.

(3) A suspended permanent or continuing certificate or full vocational authorization may be reinstated for an applicant who presents evidence that he meets either of the following requirements:

(a) Holds a master's or higher degree from an approved teacher education institution.

(b) Has completed, subsequent to the suspension, 6 semester hours of satisfactory college credit from an approved teacher education institution.

(4) A suspended permanent or continuing certificate or full authorization may be reinstated provisionally for 1 year by the state board upon request of a public or private school employer that is willing to employ and sponsor the holder full time for 1 year. The provisional reinstatement shall be authorized to the sponsoring school employer in the name of the holder under the following conditions:

(a) During the reinstatement period the school employer shall provide appropriate classroom supervision to the teacher candidate for reinstatement of the certificate or authorization. The employer shall submit a written evaluation to the state board at the end of the 1 year reinstatement period.

(b) When the employer reports completion of 1 year of successful experience during the reinstatement period the permanent or continuing certificate or full vocational authorization shall be fully reinstated.

(c) When the employer reports that the reinstatement year of experience was unsuccessful, the holder of the suspended certificate or authorization may enroll in a teacher education institution of his choice and complete a minimum of 6 semester hours of credit selected to improve the teaching skills identified by the sponsoring employer as deficient during the 1 year reinstatement period. Upon successful completion of that additional credit, the permanent or continuing certificate or full vocational authorization shall be fully reinstated.

(5) A permanent, continuing or full authorization certificate is valid for teaching in this state in the grades, subjects or levels specified on the certificate.

PART 4. STATE SPECIAL PERMITS

R 390.1141 General provisions.

Rule 41. (1) On application, the state board will issue a special permit for a person who has the statutory qualifications and has completed, or had accepted by transfer, the prescribed amount of satisfactory college credit on an approved teacher education program. The permit will be a full-year permit or substitute permit.

(2) A permit or renewal is issued to the recommending superintendent or personnel officer who shall apply therefor and affirm under oath that a certificated teacher is not available for employment. The recommending superintendent or personnel officer receiving the permit or renewal shall hold the permit or renewal for the person.

R 390.1142 Full-year special permits.

Rule 42. (1) An applicant for a full-year special permit shall present evidence that the person has completed 120 semester hours of satisfactory college credit, including 15 semester hours of credit in professional education.

(2) A full-year special permit is valid for teaching in the grades or subjects specified on the permit or both until June 30 of the school year for which the permit is issued.

(3) A full-year special permit will be renewed upon presentation of evidence that the person has completed 6 semester hours of satisfactory additional credit applying on requirements for regular certification.

R 390.1143 Substitute permits.

Rule 43. (1) An applicant for a substitute permit shall present evidence that the person has completed at least 60 semester hours of satisfactory college credit until September 1, 1970, and 90 semester hours of satisfactory college credit after September 1, 1970.

(2) After September 1, 1973, the person who presents less than 15 semester hours of credit in professional education, but at least 120 semester hours of satisfactory college credit, is eligible for a substitute permit.

(3) A substitute permit is valid for teaching on a substitute basis for a maximum of 90 days during any school year for a person with a maximum of 60 semester hours of satisfactory college credit, and for a maximum of 90 days during any semester for a person with a minimum of 90 semester hours of satisfactory college credit, except that to be eligible to teach for 90 days, the person with less than 120 semester hours shall have completed 30 semester hours of satisfactory college credit within the last 10 years.

(4) After September 1, 1973, a substitute permit is valid for teaching on a substitute basis for a maximum of 90 days during any school year.

R 390.1144 Substitute permits; renewal.

Rule 44. (1) For a person with 60 semester hours or more of satisfactory college credit who does not teach more than 90 days during any school year, the substitute permit is renewable the following year upon recommendation of the superintendent of schools and without additional credit, but no substitute permit shall be issued for any person with less than 90 semester hours after September 1, 1970.

(2) For a person with 90 but less than 120 semester hours of satisfactory college credit who does not teach more than 180 days during any school year, the substitute permit is renewable the following year upon recommendation of the superintendent of schools and upon presentation of evidence that the person is participating in a planned program approved by the sponsoring institution and has completed 10 semester hours of satisfactory college credit during the preceding 12 months.

(3) For a person with 120 or more semester hours of satisfactory college credit, the substitute permit is renewable the following year.

R 390.1145 Permits in emergency situations.

Rule 45. On recommendation of the superintendent of a local or intermediate school district, the state board may issue a permit for a person with reasonable qualifications when failure to authorize the permit will deprive children of an education. The permit shall be issued for a specific period of time under emergency circumstances not including labor disputes.

PART 5. EDUCATIONAL INSTITUTIONS

R 390.1151 Approved teacher education institutions; report; program review; selection techniques; majors and minors; specific subjects.

Rule 51. (1) The state board approves certain institutions and their programs for the purposes of preparing applicants for certification. Upon request of the state board, a teacher education institution shall present a report of its teacher education curricula and definitions of majors and minors. The programs of an approved teacher education institution are subject to periodic review by the state board.

(2) A sponsoring institution recommending applicants for teachers' certificates shall establish selection techniques which insure that only qualified students are admitted to the teacher education program and that only qualified students are sponsored for certification.

(3) Unless otherwise approved by the state board, all majors and minors offered by an approved teacher education institution shall be in subject matter fields pertinent to teaching at the level for which certification is to be recommended. The state board reserves the right to

determine the acceptability of majors and minors recommended by out-of-state institutions.

(4) An applicant who has been graduated from a specific teaching curriculum such as fine arts, industrial arts, library science, music, physical education, health education, or foreign language, may be certified to teach that specific subject in elementary and secondary grades when, upon recommendation of the sponsoring institution, the applicant qualifies at both levels.

R 390.1152 Approved teacher education institutions; equivalence option.

Rule 52. An applicant may satisfy any educational requirement for certification by presenting evidence of an equivalent as determined by the state board. In granting such equivalence the state board shall consider college graduation and scores made on standarized examinations or prior teaching experience, or any combination of these or other appropriate criteria. Evaluation of equivalence shall be under direction of the state board. The sponsoring institution may award semester hours of credit based upon equivalence on partial fulfillment of requirements for a major or minor or for any of the required credits for certification.

R 390.1153 Approved teacher education institutions; experimental programs.

Rule 53. The state board at the request of an approved teacher education institution may waive for a specific time particular requirements of this code for experimental teacher education programs. A request for such a waiver shall provide sufficient detail as prescribed to allow the state board to approve such provisions in order that substantial experimentation with patterns of teacher education may be encouraged. Upon adequate evidence, the state board may give continuing status to

an experimental teacher education program of demonstrated superiority.

R 390.1154 Out-of-state institutions.

Rule 54. (1) An applicant for certification in this state who has been educated in an accredited institution out of this state shall present evidence of having fulfilled all of the requirements established for residents of this state. The state board may accept credit from an institution accredited by its regional accrediting association.

(2) An applicant for certification in this state who presents credit from a teacher education institution not accredited by its regional accrediting association may validate such credit by gaining unconditional admission to full standing in the graduate department, division or school of a college or university fully accredited by the regional accrediting association, or completing 6 semester hours of acceptable graduate credit in an accredited institution or meeting such requirements as are specifed by the state board.

(3) Credits from institutions in foreign countries will be adjudged by the United States office of education and by the state board in determining eligibility for certification.

(4) A state elementary or secondary provisional certificate may be issued to an applicant from another state who presents evidence that he has been graduated from a teacher education institution approved by that state's appropriate education agency and has completed a program in elementary or secondary education as prescribed by that teacher education institution, if the institution is accredited at the time of his graduation by a national teacher accreditation agency approved by the state board.

R 390.1155 Non-teacher education institutions.

Rule 55. An applicant presenting credits from an institution of higher education not approved for teacher education purposes shall complete such credits as may be required by the state board in his individual case.

R 390.1156 Correspondence credits.

Rule 56. A correspondence credit may not apply toward requirements for a continuing certificate, renewal of a provisional certificate, nor conversion of a provisional or continuing certificate.

PART 6. VOCATIONAL ENDORSEMENT AND AUTHORIZATION

R 390.1161 State secondary provisional certification with vocational endorsement.

Rule 61. (1) An applicant for vocational endorsement shall meet the requirements for state secondary provisional certification as described in part 2 of these rules as well as presenting evidence of completing:

(a) A program in vocational teacher education at an institution approved by the state board for the preparation of vocational teachers in the occupational area of the endorsement.

(b) A major or a minor in an approved program in the occupational area of the endorsement.

(c) Two years of work experience in the occupational area of the endorsement or completion of a planned equivalent program of directed supervised occupational experience approved by the department of education. The occupational experience shall be characterized by its relevancy and recency.

(2) Vocational endorsement is valid for teaching in the stated occupational area in approved vocational education programs.

R 390.1162 State secondary continuing certification with vocational endorsement.

Rule 62. A state continuing certificate with a vocational endorsement may be issued to an applicant who has met the requirements for continuing certification as described in part 3 of these rules as well as presenting evidence that he has completed the following requirements:

(a) Taught successfully for 3 years according to the validity of his provisional certificate and vocational endorsement and since the issuance of the provisional certificate and vocational endorsement, as determined by the state board upon recommendation of the sponsoring institution and the local school district.

(b) Earned 18 semester hours after the issuance of his state provisional certificate and vocational endorsement in a planned course of study which includes a minimum of 10 semester hours of relevant vocational education. This advanced course of study is applicable to the applicant's professional development as determined by the state board upon recommendation of the sponsoring institution and, if appropriate, the local school district. A person with an earned master's or higher degree is not required to complete the 18 semester hour planned program.

R 390.1163 Temporary vocational authorization.

Rule 63. (1) A temporary vocational authorization document may be issued upon the report of a designated vocational teacher education institution to an applicant

presenting evidence that he has met the following requirements:

(a) Possesses a baccalaureate degree.

(b) Has a major or minor in the field of specialization in which vocational authorization is being requested or equivalent graduate credits to substitute for the required major or minor.

(c) Has a minimum of 2 years of experience in the occupational area concerned or has completed a planned program of directed supervised occupational experience approved by the state board. The occupational experience shall be characterized by its relevancy and recency.

(2) Temporary vocational authorization is valid for teaching in those courses in which instruction is limited to the occupation specified on the authorization in approved vocational programs. It is valid for 6 years.

R 390.1164 Full vocational authorization.

Rule 64. (1) A full vocational authorization document shall be issued to qualifed candidates and shall be valid for continued teaching in those courses in which instruction is limited to the occupation specified on the authorization in approved vocational programs.

(2) Applications for full vocational authorization shall contain evidence that the candidate:

(a) Has taught successfully for 3 years according to the validity of his temporary vocational authorization as determined by the state board upon recommendation of the sponsoring institution and the local school district.

(b) Has completed a minimum of 10 semester hours of professional vocational education as determined by the state board and approved by the sponsoring institution and the local school district.

(3) The validity of a full vocational authorization is specified in R 390.1134.

R 390.1165 Annual vocational authorization.

Rule 65. (1) If a candidate does not meet the standards outlined for temporary vocational authorization, an evaluation of competency shall be made by the department of education. The department shall determine the adequacy of his combined education and occupational and teaching experience in relation to the requirements set forth. A candidate shall have work experience at the journeyman level in apprenticeable trades. If the candidate is deemed competent, a 1-year vocational authorization shall be issued to the school district. This annual vocational authorization is planned primarily for persons who will be teaching only vocationally approved trade and industrial and health occupation courses in grades 9 to 12.

(2) This annual authorization is valid for teaching those courses in approved programs, in which instruction is limited to the occupation specified on the authorization.

(3) A vocational authorization is renewable annually upon the recommendation of the employing local school district.

R 390.1166 Credit from institutions not designated for preparation of vocational teachers.

Rule 66. Candidates for vocational endorsement or authorization who present credit from a teacher education institution not approved by the state board for the preparation of vocational teachers may validate the credit

by gaining unconditional admission to full standing in the graduate department, division, or school of a college or university approved for vocational teacher education, by completing 6 semester hours of acceptable graduate credit in an institution approved by the state board for the preparation of vocational teachers, or meet the requirements specified by the state board.

R 390.1167 Instructional programs leading to state or federal license.

Rule 67. Personnel assigned instructional responsibility in fields for which a state or federal license is required shall hold the appropriate license before requesting a vocational endorsement or authorization.

PART 7. CERTIFICATION OF TEACHERS UNTIL 1970

R 390.1171—R 390.1179 Rescinded.

PART 8. CERTIFICATION OF CERTAIN TEACHERS UNTIL 1976

R 390.1181—R 390.1189 Expired.

PART 9. EFFECTIVE DATE AND RESCISSION

R 390.1198 Effective date.

Rule 98. These rules are effective July 1, 1967.

R 390.1199 Rescission.

Rule 99. The teacher's certification code of the state board of education, being R 390.401 to R 390.533 of the Michigan Administrative Code, and appearing on pages 4001 to 4012 of the 1954 volume of the Code, with amendments to rules appearing on pages 109 and 110 of the 1955 Annual Supplement to the Code, pages 3258

and 3259 of the 1964-65 Annual Supplements to the Code, and page 65 of Supplement No. 46 to the Code, is rescinded. The state board rule pertaining to fees for certificates and duplicates, being R 390.691 of the Michigan Administrative Code, and appearing on page 2622 of the Annual Supplement to the Code, is rescinded.

PART 10. ADMINISTRATIVE HEARINGS

R 390.1201 Certificates; denial, suspension, or revocation reinstatement.

Rule 101. (1) The state board may refuse to grant or renew, or may revoke or suspend for a fixed term, or may impose reasonable conditions on, a teaching certificate granted pursuant to these rules for the following reasons:

(a) Fraud, material misrepresentation, or concealment in the application for a certificate.

(b) Failure or ineligibility of the applicant or certificate holder to meet the criteria for eligibility for the certificate.

(c) Conviction, as an adult, of an act of immoral conduct contributing to the delinquency of a child, or of a felony involving moral turpitude.

(2) A certificate shall not be denied, suspended, or revoked solely on the basis of a prior felony conviction, unless it is related reasonably and adversely to the ability of the person to serve in an elementary or secondary school.

(3) Upon application and a showing of good cause, the state board may reinstate a suspended or revoked certificate or may grant a new certificate. The applicant or certificate holder shall be permitted to demonstrate that, at the present time, he has the ability to serve in a teaching position without adversely affecting children or

other members of the profession, and shall provide proof that he is rehabilitated.

R 390.1202 Contested case; grounds.

Rule 102. A contested case may be instituted pursuant to chapter 4 of Act No. 306 of the Public Acts of 1969, being § 24.271 et seq. of the Michigan Compiled Laws, in the event of a refusal to grant or renew a teacher's certificate, or in the event of a suspension or revocation of a teacher's certificate.

R 390.1203 Investigation.

Rule 103. Upon receipt of information which may serve as the basis for a refusal to grant or renew a teacher's certificate, or as the basis for the suspension or revocation of a teacher's certificate, the superintendent of public instruction shall initiate an investigation of that information.

R 390.1204 Written charges; service; notice of opportunity to show compliance.

Rule 104. (1) If the superintendent of public instruction determines that probable cause exists for the suspension or revocation of a teacher's certificate, the superintendent shall initiate the preparation and filing of written charges with the state board and shall cause a copy thereof and a notice of opportunity to show compliance to be served upon the teacher in question.

(2) Within 20 days of service of the notice of opportunity to show compliance, a teacher may request an informal conference to show compliance. The informal conference shall be with an authorized representative of the state board.

(3) After the informal conference, the state board may, after considering the recommendation of its authorized representative, make a finding of compliance, enter

into a written settlement of the matter with the teacher without a hearing, or direct that a notice of hearing issue.

R 390.1205 Notification of rights; copies of rules and laws.

Rule 105. Upon receipt of written charges, the state board shall inform the teacher of hearing rights under these rules, and under sections 71 to 92 of Act No. 306 of the Public Acts of 1969, being §§ 24.271 to 24.292 of the Michigan Compiled Laws, and known as the administrative procedures act of 1969, and section 10 of Act No. 287 of the Public Acts of 1964, being § 388.1010 of the Michigan Compiled Laws. A complete copy of the rules and laws shall be furnished the teacher.

R 390.1206 Notice of hearing; written charges; settlement; absence of party; hearing as public or private.

Rule 106. (1) Within 30 days of service of the notice of opportunity to show compliance, if the teacher does not request an informal conference, a notice of hearing and a copy of the written charges shall be served upon the teacher.

(2) After an informal conference and a decision by the state board to proceed to hearing, a notice of hearing and a copy of the written charges shall be served upon the teacher.

(3) The written charges may be amended between the time of the notice of opportunity to show compliance and the notice of hearing.

(4) If the teacher fails to attend the hearing, the hearing may proceed and the decision may be made in the absence of the teacher.

(5) The teacher and the state board may agree in writing to a settlement of the matter without a hearing.

(6) A hearing shall be public or private at the request of the teacher.

R 390.1207 Answer to formal charges; bill of particulars.

Rule 107. (1) A teacher may file an answer to formal charges with the state board. The answer shall be filed not less than 10 days prior to the hearing.

(2) If the formal charges are believed by the teacher to be so ambiguous that an answer cannot be adequately prepared, the teacher may file a motion for a bill of particulars with the hearing officer. The request for a bill of particulars shall be granted upon a demonstration of good cause.

R 390.1208 Representation; appearance by legal counsel; service on attorneys of record.

Rule 108. (1) A teacher may represent himself or be represented by legal counsel or another duly authorized representative.

(2) An appearance by legal counsel shall be filed in writing and at the earliest possible time. Thereafter, service upon the attorneys of record shall be deemed service upon the parties.

R 390.1209 Hearing officer; duties.

Rule 109. A hearing officer designated by the state board shall promptly establish hearing dates, inquire fully into all facts relevant to each proceeding, and submit proposals for decision to the state board and the parties.

R 390.1210 Hearing officers; qualification; prohibited communications.

Rule 110. (1) The hearing officer shall be from an office completely separated from any person involved in investigatory or prosecutorial functions regarding contested cases pertaining to teacher certification.

(2) A hearing officer shall not directly or indirectly communicate with a party, a representative of a party, or

other person who has been engaged in investigatory or prosecutorial functions regarding any issue of fact or law, except on notice and opportunity for all parties to participate, unless otherwise provided by law.

R 390.1211 Witnesses; fees and expenses; exclusion from hearing; communication.

Rule 111. (1) A witness, except a state employee, requested by the hearing officer shall be paid an appropriate witness fee and expenses by the party that had the hearing officer request the presence of the witness. Fees and expenses shall be consistent with those provided in circuit court.

(2) Upon motion and a showing of good cause, a prospective witness may be excluded from a hearing. Witnesses may be instructed not to communicate with a prospective witness.

R 390.1212 Transcript; evidence; exhibits.

Rule 112. (1) A hearing reporter shall transcribe the testimony taken at a hearing and file the certified original with the state board upon request of the hearing officer or the state board. A party may request a copy of the transcript at his own expense. When a transcript is prepared, the certified original shall be filed with the state board and all parties shall be notified.

(2) Evidence in a contested case may be retained in the custody of a person designated by the hearing officer or the state board upon such terms as are just, practicable, and designed to preserve the evidence without undue interference on any other legal proceeding.

(3) Exhibits shall be retained by the hearing officer until such time as they are certified and filed with the state board, along with the proposal for decision.

R. 390.1213 Exceptions, cross exceptions, and briefs.

Rule 113. (1) Within 20 days after service of the proposal for decision, a party may file a written statement with the state board setting forth exceptions thereto or to any other part of the record or proceeding, including rulings upon motions and objections. A brief in support of these exceptions may be filed with the state board. A copy of the exceptions and any brief shall be served on each party to the proceedings.

(2) Within 10 days after service of an exception, a party may file a cross exception and a brief in support thereof, or a brief in support of the proposal for decision. A copy of the cross exceptions and any brief shall be served on each party to the proceedings.

R 390.1214 Oral arguments.

Rule 114. If a party desires to present oral arguments to the state board, a written request therefor shall be made to the state board at the time an exception, cross exception, or brief is filed. The state board, on its own motion, may direct oral argument.

R 390.1215 Advice of attorney general or designated assistant.

Rule 115. The state board may seek the legal advice of the attorney general, or a designated assistant other than a person who may have engaged in investigatory or prosecutorial functions, with regard to the contested case under consideration or a factually related case.

R 390.1216 Proposal for decision; action by state board.

Rule 116. The state board may adopt, modify, or reverse the proposal for decision.

ENDORSEMENT OF TEACHERS AS COUNSELORS

(By authority conferred on the state board of education by sections 10 and 15 of Act No. 287 of the Public Act of 1964, as amended, and section 570 of Act No. 269 of the Public Acts of 1955, as amended, being §§388.1010, 388.1015, and 340.570 of the Michigan Compiled Laws)

R 390.1301 Definitions.

Rule 1. As used in these rules:

(a) "Valid Michigan teaching certificate" means a provisional, continuing, permanent or life teaching certificate issued by the state board of education enabling the holder to teach at the elementary or secondary school level during the school year in which he wishes to serve as a counselor.

(b) "Counselor" means an individual who has successfully completed an approved counselor education program and performs a counseling role.

(c) "Counseling role" or "guidance" means specialized activities performed by an individual when assisting students to identify, plan and attain those goals consistent with their aptitudes, needs, abilities and interests; when coordinating and integrating services directly related to students' mental, physical, social and emotional well-being; and when consulting with parents, teachers and other specialists regarding pupil growth, learning and development.

(d) "Sponsoring institution" means a higher education institution approved for teacher education by the state board of education and which is willing to make recommendations as to applicants for the several certificates provided for in the teacher certification code, being R 390.1101 to R 390.1199 of the Michigan Administrative Code.

(e) "Elementary level" means grades kindergarten through 9.

(f) "Secondary level" means grades 7 through 12.

R 390.1302 Persons required to hold counselor endorsements.

Rule 2. A person employed in a public elementary or secondary school in a counseling role shall hold a valid Michigan teaching certificate with a counseling endorsement.

R 390.1303 Qualifications for counselors.

Rule 3. (1) An applicant for endorsement shall possess a current valid Michigan teaching certificate. The sponsoring institution shall make recommendation concerning counselor endorsement at the appropriate level or levels, elementary and secondary, for which he qualifies.

(2) An applicant shall have successfully completed an approved counselor education program of not less than 18 semester hours of credit. The program shall be approved by the state board of education and shall include the following skills and content areas or their equivalent:

(a) Guidance services—philosophy, principles and practices.

(b) Individual and group analysis—nature and range of human characteristics, and appraisal methods.

(c) Guidance information—vocational development theory, educational and occupational information.

(d) Counseling theory and practice—individual and group procedures, administration and coordination relationships, professional relationships and ethics.

(e) Supervised experiences—laboratory, practicum or internship.

(f) Evaluation—statistics and research methodology, follow-up evaluation and measurement methods.

R 390.1304 Experimental counselor education programs.

Rule 4. The state board of education, at the request of an approved teacher education institution, may waive for a specific time any requirement set forth in R 390.1303 for experimental counselor education programs. A request for a waiver shall provide sufficient detail to allow the board to approve such provisions in order that substantial experimentation with patterns of counselor education may be encouraged. Upon adequate evidence, the board may give continuing status to an experimental counselor education program of demonstrated superiority.

R 390.1305 Applications and credits.

Rule 5. (1) An application for school counselor endorsement shall be directed to the state board of education on a form supplied or approved by the board. An application may be submitted after January 1, 1971.

(2) Credits toward school counselor endorsement shall be completed through an approved sponsoring institution or accepted in transfer by such an institution. The board reserves the right to determine the acceptability of credits presented for endorsement from approved counselor education institutions located in other states.

(3) A person with a valid Michigan teaching certificate, employed as a school counselor for a period of not less than 1 year prior to July 1, 1971, may apply for school counselor endorsement, provided that he shall have earned a minimum of 12 semester hours of graduate credit in the field of guidance and counseling or its equivalent as determined by the board. Applications for endorsement for the school year 1971-1972 shall be filed with the board before July 15, 1971. For good cause shown, the board may receive applications for endorsement after July 15, 1971. Applications for endorsement based on work experience and a minimum of 12 semester hours of graduate credit in the field of guidance and counseling or its equivalency shall be filed prior to July 1, 1973.

Supreme Court, U.S.
FILED
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No. 86-1560

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

SHERIDAN ROAD BAPTIST CHURCH, et al,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, et al,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Michigan

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Michigan statute requiring the use of certificated teachers for secular instruction in public and private, including religious, elementary and secondary schools violates petitioners' rights of free exercise of religion under the First Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. REASONS WHY THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI	3
A. This Court has already declined to review this issue several times	3
B. The prior decisions of this Court consistently support the authority of the states to impose reasonable educational standards on private, religious elementary and secondary schools	4
C. Appellate courts of other states have reached the same result that Michigan's appellate courts reached in this case	5
D. The fifty state legislatures, rather than this Court, should be able to select the means for furthering the state's compelling interest in the secular education of all young people in the state	6
CONCLUSION	7

INDEX OF AUTHORITIES

Cases	Page
Board of Education v *Allen*, 392 US 236 (1968)	4
Brown v *Board of Education*, 347 US 483 (1954)	6
Johnson v *Charles City Community Schools Board of Education*, 368 NW2d 74 (Iowa, 1985), *cert den sub nom Pruessner* v *Benton*, ___ US ___; 106 S Ct 594 (1985)	4, 5
Kentucky State Board for Elementary and Secondary Education v *Rudasill*, 589 SW2d 877 (Ky, 1979), *cert den* 446 US 938 (1980)	6
Lemon v *Kurtzman*, 403 US 602 (1971)	5
Meyer v *Nebraska*, 262 US 390 (1923)	5
Pierce v *Society of Sisters*, 268 US 510 (1925)	5
Runyon v *McCrary*, 427 US 160 (1976)	5
Sheridan Road Baptist Church v *State of Michigan*, 132 Mich App 1; 348 NW2d 263 (1984)	1, 2
Sheridan Road Baptist Church v *State of Michigan*, 426 Mich 462; 396 NW2d 373 (1986)	1, 2, 3, 7
State of Nebraska ex rel Douglas v *Faith Baptist Church of Louisville, Nebraska*, 207 Neb 802; 301 NW2d 571 (1981), *app dis* 454 US 803 (1981)	3, 5
State of North Dakota v *Patzer*, 382 NW2d 631 (ND, 1986), *cert den* ___ US ___; 107 S Ct 99 (1986)	4
State of North Dakota v *Rivinius*, 328 NW2d 220 (ND, 1982), *cert den* 460 US 1070 (1983)	4, 5
State of North Dakota v *Shaver*, 294 NW2d 883 (ND, 1980)	5
State of Ohio v *Whisner*, 47 Ohio St 2d 181; 351 NE2d 750 (1976)	6

Page

State of Vermont v *LaBarge*, 134 Vt 276; 357 A2d 121 (Vt, 1976) 6

Wisconsin v *Yoder*, 406 US 205 (1972) 5

Wolman v *Walter*, 433 US 229 (1977) 5

Michigan Statutes and Regulations

MCL 388.553; MSA 15.1923 1

1979 AC, R 390.1145 2

No. 86-1560

In The
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October Term, 1986

SHERIDAN ROAD BAPTIST CHURCH, et al,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, et al,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Michigan

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In Michigan, the Legislature has required, since 1921, that teachers in both public and private elementary and secondary schools hold a teaching certificate. See MCL 388.553; MSA 15.1923. Petitioners contend that this certification requirement, as applied to them, violates their free exercise of religion rights under the First Amendment.

The Michigan Court of Appeals unanimously sustained the certification requirement as applied to petitioners. 132 Mich App 1; 348 NW2d 263 (1984). The Michigan Supreme Court affirmed that decision by an equally divided court. 426 Mich 462; 396 NW2d 373 (1986).

Many religiously-affiliated colleges and universities operate teacher training programs that have been accepted by Michigan for teacher certification purposes. Many graduates of fundamentalist Christian institutions, such as Bob Jones University, have received Michigan teaching certificates. Petitioners have no religious objections to hiring teachers holding valid Michigan teaching certificates. Both schools employ teachers who hold valid Michigan teaching certificates. A person holding a valid Michigan teaching certificate could teach the curriculum used in petitioners' schools without violating petitioners' religious beliefs. There was no testimony at trial that there is a shortage of certificated teachers who share petitioners' religious beliefs or that petitioners cannot staff their schools with certified teachers. In addition, if petitioners were unable to find sufficient certificated teachers who also met their religious qualifications, 1979 AC, R 390.1145 authorizes issuance of emergency permits for persons "with reasonable qualifications when failure to authorize the permit will deprive children of an education." See 426 Mich, *supra*, at 482, 495-497; 396 NW2d, *supra*, at 381-382, 388 and 132 Mich App, *supra*, at 12-13, n 1; 348 NW2d, *supra*, at 269-270, n 1.

Petitioners' own expert agreed that educational qualifications are desirable in the teaching profession. In Michigan, a candidate for certification must take a minimum of 20 semester hours of education courses, which includes a minimum of six semester hours of directed student teaching. Petitioners' expert, Dr. Russell Kirk, testified that directed student teaching is "always a good thing." His objection to teacher certification was centered on the other fourteen hours of education courses which, in his view, consume time that should be spent on substantive subject matter courses. This dispute over fourteen hours out of a four-year college program clearly does not rise to the level of a federal constitutional issue that this Court should re-

view. See 426 Mich, *supra*, at 473, 510; 396 NW2d, *supra*, at 378, 394-395, and Transcript, Vol 4, April 20, 1982, at pp 40, 53-54.

SUMMARY OF ARGUMENT

This Court has consistently refused to review teacher certification requirements challenged on free exercise grounds. This Court's earlier decisions support the power of the states to impose reasonable regulations on private, including religious, elementary and secondary schools. The result reached in this case is consistent with the result reached by other state appellate courts on this issue. The selection of the means by which each state furthers its compelling interest in the secular education of all young people in the state is a matter for the elected representatives of the people in each of the fifty states rather than this Court.

ARGUMENT

I.

REASONS WHY THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

A. This Court has already declined to review this issue several times.

In *State of Nebraska ex rel Douglas* v *Faith Baptist Church of Louisville, Nebraska*, 207 Neb 802; 301 NW2d 571 (1981), this Court rejected a free exercise claim against Nebraska's statutory teacher certification requirement. This Court dismissed the appeal "for want of a substantial federal question." 454 US 803 (1981). On three subsequent occasions, this Court again declined to review unsuccessful free exercise challenges to statutorily imposed teacher

certification requirements. *State of North Dakota* v *Rivinius*, 328 NW2d 220 (ND, 1982), *cert den* 460 US 1070 (1983); *Johnson* v *Charles City Community Schools Board of Education*, 368 NW2d 74 (Iowa, 1985), *cert den sub nom Pruessner* v *Benton*, ___ US ___; 106 S Ct 594 (1985); *State of North Dakota* v *Patzer*, 382 NW2d 631 (ND, 1986), *cert den* ___ US ___; 107 S Ct 99 (1986).

B. The prior decisions of this Court consistently support the authority of the states to impose reasonable educational standards on private, religious elementary and secondary schools.

In *Board of Education* v *Allen*, 392 US 236, 245-247 (1968), this Court recognized the authority of state legislatures to impose minimum standards on private religious schools as follows:

> "The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of Pierce v Society of Sisters, 268 US 510, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925), the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools main-

> tained by the Society of Sisters. Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of Pierce v Society of Sisters: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. . . . "
> (Footnotes omitted.)

Other cases recognizing this authority include *Meyer* v *Nebraska*, 262 US 390, 402 (1923); *Pierce* v *Society of Sisters*, 268 US 510, 534 (1925); *Lemon* v *Kurtzman*, 403 US 602, 614 (1971); *Wisconsin* v *Yoder*, 406 US 205, 213 (1972); *Runyon* v *McCrary*, 427 US 160, 178-179 (1976); *Wolman* v *Walter*, 433 US 229, 240 (1977).

C. Appellate courts of other states have reached the same result that Michigan's appellate courts reached in this case.

Other state appellate courts have consistently upheld statutory teacher certification requirements against free exercise of religion challenges. *State of North Dakota* v *Shaver*, 294 NW2d 883 (ND, 1980); *State of Nebraska ex rel Douglas* v *Faith Baptist Church, supra; State* v *Rivinius, supra; Johnson* v *Charles City Community Schools Board of Education, supra.* These decisions, in harmony with the teachings of this Court, sustain reasonable state regulations imposed on both public and private,

including religious, elementary and secondary schools in furtherance of each state's compelling interest in the secular education of all young people in the state.

The cases relied upon at pages 11 and 12 of the petition for certiorari, in support of an alleged conflict in state court decisions on the teacher certification issue, are clearly not applicable. *Kentucky State Board for Elementary and Secondary Education* v *Rudasill*, 589 SW2d 877 (Ky, 1979), *cert den* 446 US 938 (1980), was decided solely on the basis of a unique Kentucky state constitutional provision that no man "be compelled to send his child to any school to which he may be conscientiously opposed." *State of Ohio* v *Whisner*, 47 Ohio St 2d 181; 351 NE2d 750 (1976), involved an attempt at gross overregulation of nonpublic schools far more onerous than even those regulations to which Ohio public schools were subject. *State of Vermont* v *LaBarge*, 134 Vt 276; 357 A2d 121 (Vt, 1976), was a truancy prosecution. While a child had to attend an "approved" nonpublic school to be exempt from the compulsory attendance law, schools were not required to be approved and there was no statutory mechanism for regulating nonpublic schools. Upon close examination, it is clear that there is no conflict among state courts on the teacher certification issue as applied to private, religious schools.

D. **The fifty state legislatures, rather than this Court, should be able to select the means for furthering the state's compelling interest in the secular education of all young people in the state.**

It is beyond dispute that the State of Michigan, along with the other 49 states, has a compelling interest in the secular education of its youthful residents. *Brown* v *Board of Education*, 347 US 483, 493 (1954). There are a variety of potential means to effectuate that compelling state interest including teacher certification, teacher testing, or some form of standardized testing of students in private

schools. Six states, including Michigan, have imposed teacher certification requirements. Other states have recently amended their legislation to provide different means of effectuating their compelling interest in the secular education of their resident youth. 426 Mich, *supra*, at 561-562, n 58, n 59; 396 NW2d, *supra*, at 419-420, n 58, n 59.

Since only six states currently impose comparable teacher certification requirements upon nonpublic schools, it is hardly a national problem demanding this Court's attention. Further, the legislative activity in this area demonstrates that, in keeping with our democratic federal system and separation of powers, elected representatives in each state should and do make these educational decisions for the people of each state. This Court should not attempt to enunciate a rule binding upon all fifty states.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 86-1560

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

SHERIDAN ROAD BAPTIST CHURCH, *et al.*,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF REPLY	1
REPLY	2
CONCLUSION	7

TABLE OF AUTHORITIES

Cases: Page

Board of Education v. Allen, 392 U.S. 236 (1968). 2

Pierce v. Society of Sisters, 268 U.S. 510 (1925) . . 3

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 3

Statutes and Regulations:

1979 Mich. Adm. Code, R 390.1145 5

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SUMMARY OF REPLY

The holding of the court below, that a state may shut down church schools and shunt their enrolled children into schools not of the churches' faith — solely to enforce a statute requiring 100% of the schools' teachers to be state-certificated — has never been accorded plenary review by this Court. The record herein affords the Court a highly developed factual basis for decision, not found in any previous case. Decisions of this Court, cited by respondents, in cases such as *Board of Education v. Allen*, *Pierce v. Society of Sisters*, and *Wolman v. Walter* (Br. 4-5)* did not test the issues here presented. The writ should not be denied on the ground that only six states

* The signal "Br." refers to Brief in Opposition.

require state certification of private school teachers; that fact merely strongly suggests that there is no compelling state interest in the enforcing of Michigan's statute in this case. Granting the writ would in no way interfere with the power of fifty state legislatures to select proven, effective means for furthering education of the young. Respondents misrepresent the trial record in critically important details.

REPLY

Petitioners address the following arguments made in the Brief in Opposition:

1. *That Prior Decisions Of The Court Call For Denial Of The Writ.* None of the state court cases cited by respondents (Br. 3-4) embraced evidentiary records comparable in breadth to that developed herein. Three nationally recognized educational experts, an expert on child psychology, a leading scholar in the area of philosophy and religion; pastors, administrators, teachers, and students in the schools, their parents; numerous local school officers and the highest state educational officials supplied testimony and extensive documentary evidence.

Respondents also cite to seven decisions of this Court (*Board of Education v. Allen*, 392 U.S. 236 (1968), etc., Br. 4-5). Not one of these dealt with the questions presented by petitioners (or even by respondents).

2. *That The Writ Should Be Denied Since State Legislatures Should Have Final Authority To "Make Educational Decisions For The People Of Each State." (Br. 6-7).* Respondents fail to say *how* granting the writ (or even subsequently reversing the evenly divided Michigan Supreme Court) would tie the hands of state legislatures in selecting means of furthering education. Respondents' plea is simply an unsupported admonition to the Court that it not involve itself in the question of whether states are immune from constitutional restraints in shutting down schools of churches which

dare not recant doctrine which bars their obeying a law requiring them to hire none but teachers licensed by the state.

3. *That The Churches' Schools May Be Shut Down Without Proof Of A Compelling State Interest Necessitating That Step, Or Proof That Less Restrictive Means Do Not Exist.* (a) Respondents ignore any discussion of the record herein on the essential issue of compelling state interest. Instead they seek to persuade the Court that the compelling state interest in the State's teacher licensing scheme herein is "the secular education of all young people in the state." (Br. 3). Such a generality misconceives the meaning of "compelling state interest." The issue here is not the general proposition that the State has an interest in the secular education of the young. The narrow issue instead is whether enforcing a statute which bars, on pain of closure, a church school from utilizing even one non-certified teacher for its classes is dictated by a compelling state interest. This involves the related issue of whether parents — as the primary educators of their children (*Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)) — shall be denied religious choice of a schooling which, as citizens of highly competent background, they find to be excellent. (J.A. 144a-145a). The record, of course, and the opinion of three Michigan Supreme Court justices, flatly contradict the State's claim of compelling interest. (A-92 — A-103). The fact that 44 states — all conceivably as interested in education as Michigan — do not venture to impose government licensing on private school teachers is evidence that such licensing represents no major societal interest.

(b) So, too, respondents essentially ignore the teaching of this Court (*Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972)) on less restrictive means. The record, as well as the opinion of three Michigan Supreme Court justices, establishes that less restrictive means were amply shown to exist. (J.A. 118a-194a; A-100 — A-103). Respondents,

however, do refer to less restrictive means in one sentence which undoes their claim that the Michigan teacher licensing statute *must* be imposed because *no* less restrictive means can be dreamt of. That sentence is:

> "Other states have recently amended their legislation to provide *different* means of effectuating their compelling interest in the secular education of their resident youths."

(Br. 7. Emphasis supplied). Respondents thus inform the Court that they recognize that *other means do in fact exist* for realizing the common interest in good education.

4. *That The Court Must Treat As Facts Matters Not Found In The Record Or Contrary To The Record.* Respondents utilize their Statement of the Case for argumentation. (Br. 2-3). They here state a series of allegedly factual matters (omitting citation to the record as to all but one of these). (*Ibid.*). These factual assertions are not supported by the record, and the arguments made in the Statement of the Case, based upon them, are false:

a. *No real religious objection to Michigan teacher certification program.* (Br. 2). Respondents imply that petitioners' objections to the program cannot be substantial or sincere, since persons of any religious affiliation, even fundamentalist, have accepted Michigan certificates; even petitioners have no religious objection to hiring Michigan-certificated teachers; and a certificated teacher can teach petitioners' curriculum without violating petitioners' beliefs. (*Ibid.*). Irrespective of whether these assertions are supported by the record, they are absolutely irrelevant and seek to mislead the Court. The *record* establishes that petitioners' religious objections to certification center upon the power of the state (a) to determine who shall or shall not engage in a church ministry (J.A. 67a, 22a-23a), (b) to license church staff (J.A. 67a), (c) to bar an individual from exercising a religious

vocation in the teaching of children (J.A. 19a, 23a, 168a), (d) to suppress exercise of the right of petitioner parents to select these particular schools for their children. (J.A. 130a-149a).

b. *No problem of teacher shortage.* (Br. 2). Respondents (again avoiding record citation) say that the teacher licensing requirement imposes no hardship on petitioners since "[t]here was no testimony at trial that there is a shortage of certificated teachers who share petitioners' religious beliefs or that petitioners cannot staff their schools with certified teachers." (*Ibid.*). In any event, so it is said, 1979 Mich. Adm. Code, R 390.1145 would allow them to employ non-certificated teachers through emergency permits. (*Ibid.*).

To the contrary, petitioners (who best know their own situation) testified that "[t]eacher certification would make it very difficult and burdensome for us to provide teachers for our schools." (J.A. 67a). The administrative regulation, 1979 Mich. Adm. Code, R 390.1145, designed for the public schools, in no way allows for lessening of the churches' teacher supply problem. Its availability depends upon the recommendation of public school officials, state board determination of the person's qualifications, the existence of undefined "emergency circumstances"; and it is valid only during the "emergency." Thus the "emergency permit" concept is utterly irrelevant to the regular, ongoing life of a non-public, church school. Further, even if applicable, it would be subject to the same objections which petitioners have expressed to governmental dictation of who shall carry out the churches' mission to children.

But if the "emergency" provision *can* be used as an effective and practical means of relieving the churches' teacher shortage problem, then the proposition that a compelling state interest dictates that none but state-certified teachers be employed in church schools is shown to be baseless.

c. *"Educational qualifications are desirable in the teaching profession."* (Br. 2). Petitioners emphatically agree, as the record shows. (J.A. 91a-93a; 118a-130a). Respondents seek to minimize the federal constitutional issue before this Court by making it appear that the expert educational witnesses called by petitioners had but a single and trivial educational objection to the teacher certification program — namely, that the candidate for a certificate must take too many hours of education courses. (Br. 2). Notably (again) respondents' factual assertion do not refer to the record. Petitioners respectfully suggest that the testimonies of Dr. Donald Erickson (J.A. 283a-285a), Dr. Russell Kirk (J.A. 205a-222a), Dr. Paul Frederick Schmidt (J.A. 149a-168a), and Dr. Judith E. Lanier (J.A. 100a-118a) render baseless the claims of the State that a compelling state interest requires the imposition of its program on petitioners' schools. It is notable that the record lacks *one iota of statistical or other research evidence* by the State *linking its program to actual student achievement.* The Court should note, in vivid contrast, the results, freely offered for the record, of achievement by the churches' schools on the nationally standardized Stanford Achievement Test and Metropolitan Achievement Tests. (J.A. 120a-121a, 399a-451a). (And see Erickson testimony on the significance thereof, J.A. 282a).

CONCLUSION

For the foregoing reasons, responsive to the arguments contained in the Brief In Opposition, the petition should be granted.

Respectfully submitted,

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